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No. ___

In The
Supreme Court of the United States

MICHAEL HANNING LORIZ,
CARA FRANCKE LORIZ
Petitioners,

v.

JOHN B. CONNAUGHTON, *et al*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

A circuit court order holding that a private-use, physical invasion taking cannot cause irreparable harm to an absentee landowner raises questions as to whether the Fifth Amendment's post-deprivation compensation remedy rules out the availability of injunctions for victims of constitutional violations associated with a taking.

1. When do deprivations of private property rights, including the right to safely use residential property and exclude others from it, amount to irreparable injury rather than purely economic harm? Does a landowner's absentee status dictate that harm cannot be irreparable?

2. Are citizens' rights to federal court injunctions improperly restricted by courts that do not distinguish takings that violate more than the Just Compensation Clause from those that are only unconstitutional after compensation is denied pursuant to *Williamson County* and other post-deprivation precedents?

3. Are plaintiffs who seek both equitable relief and damages for interference with constitutional rights pursuant to 42 U.S.C. § 1983 — rights including but not limited to the Takings Clause — effectively barred from injunction by the just compensation guarantee?

PARTIES TO THE PROCEEDINGS

Petitioners, who are plaintiffs-appellants below, are Michael Hanning Loriz and Cara Francke Loriz, hereinafter "Loriz."

Respondents, who are defendants-appellees below, are John B. Connaughton (individually); Charles Keller, Christopher Keller, Michael Simmons (individually) and their business Ridge Wind Quail Hunts, LLC (referred to together as "Ridge Wind"); Lee Steenken, Thomas Bevington, Gary Salman, John Zboril, Walt Filpot, Alan Daniel, Michael A. Fox, Gregory V. Jolivette, Charles R. Furmon, Thomas Turner, Richard K. Jones, Anthony E. Dwyer, Robin Piper, Roger Gates, William E. Balsinger, James M. Fox (officials of Butler County, Ohio, and referred to as a group as "the County"); the Hon. Anthony Valen, the Hon. William W. Young, the Hon. Stephen W. Powell (Ohio Twelfth Appellate Court justices referred to as a group as "the Judges"); and Steven A. Gray (Chief, State of Ohio, Division of Wildlife, referred to as "the State").

RULE 29.6 DISCLOSURE STATEMENT

None of the Petitioners is a corporation.

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OPINIONS BELOW

The ruling of the Sixth Circuit Court of Appeals for which review is sought is its unreported order of August 18, 2006, Case No. 06-3427. Appendix, p. 2a-3a. The original district court opinion is unreported and presented in pertinent part. App. 4a-24a.

JURISDICTION

The ruling of the Sixth Circuit was entered on August 18, 2006. A motion for reconsideration filed by the Petitioners was denied on October 10, 2006. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) for a court of appeals ruling made before rendition of judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioners raise questions as to rights protected by the United States Constitution under the Fifth, the Fourteenth, and the First amendments. App. 46a. Petitioners also invoke 42 U.S.C. § 1983 (App. 47a) for interference with these rights.

STATEMENT

This case demonstrates the need for clear standards distinguishing unconstitutional takings that cause irreparable harm and thereby justify injunction

prior to trial from those that are wholly remedied by post-deprivation compensation.

Petitioners Mike and Cara Loriz have sought injunction against illegal commercial shooting activities that result in acknowledged lead shot trespass into their property in Butler County, Ohio. In 1995, Loriz purchased a 45-acre agricultural/residential property and personally built a country home and outbuildings. Loriz reforested much of the property under a stewardship program administered by the State of Ohio.

Five years later, large-scale shooting events ensued adjacent to the Loriz residence on the property of Charles and Christopher Keller. Up to 1,000 rounds of 12-guage shotgun projectiles were fired in a day, as close as 300 feet from the Loriz house with no restrictions on shot direction. The family could not exit the house without fear of injury by lead projectile.

Shooting continues to this day and is authorized by the State of Ohio Division of Wildlife, through various licenses and permits, and by Butler County, Ohio, through a conditional commercial recreation permit granted by the County Board of Zoning Appeals. None of the licenses or permits regulate the Loriz property in any way. After administrative appeals of the County permit failed (the State provides no notice and no administrative appeal for the shooting range licenses it grants), the Loriz family vacated the property and fled to a family rental home in New York. They still pay taxes on the Ohio property, insure it and are required by law to maintain the fence-line between their property and the shooting range.

A. Federal Claims and Injunction Proceedings

State-authorized shooting creates claims of a physical taking of the Loriz property for private use,

threats to their bodily integrity and endangerment to anyone entering the shotfall zone, which extends into a public road. Loriz has been denied protection of criminal statutes that prohibit such shooting by a conspiracy to obstruct, both in practice and prospectively, enforcement of these laws by the same County government that authorizes the commercial shooting. Shooting operations were expanded twice in violation of the Petitioners' First Amendment rights. Lead shot fired into the Petitioners' property contaminates it and enters creeks that recharge the Great Miami Aquifer, Cincinnati's drinking water supply.

Loriz filed a §1983 suit in the Eastern District of New York in 2004 after fleeing the physical invasion of the Ohio residence. Loriz re-filed in the U.S. District Court for the Southern District of Ohio after the New York case was dismissed for improper venue in 2005.

The district court had jurisdiction over Loriz claims pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331 and §1332; Loriz later invoked 28 U.S.C. §1367 for jurisdiction of lesser claims.

After dismissal and summary judgment motions were filed by several defendants, Loriz filed a motion for preliminary injunction in the district court. *Contra* memoranda from government defendants specified that they did not oppose enjoining the private shooting operations. Ridge Wind Defendants opposed injunction but offered no evidence to show they would be harmed by it. The County asked for an extension of time to respond. They did not reply before Magistrate Judge Timothy S. Black issued his Reports and Recommendations (R&Rs) to dismiss. The magistrate found that conditions imposed on commercial shooting "are wholly insufficient to protect the Plaintiffs and their property" (App. 8a), but dismissed what he identified as regulatory takings and ancillary claims without prejudice as unripe pursuant to

Williamson County Reg'l Planning Comm's v. Hamilton Bank, 473 U.S. 172, 186 (1985). Loriz objected to the R&Rs in their entirety, particularly the magistrate's recommendation to consider a pending and substantively unopposed injunction motion as moot.

The §1983 suit was dismissed in district court by final order of the Honorable Sandra S. Beckwith (App. 4a) to adopt the R&Rs as "entirely correct." The order did not address the outstanding injunction motion but functioned to dispose of it.

B. The Court of Appeals Order

The notice of appeal was filed in the U.S. Court of Appeals for the Sixth Circuit, which has jurisdiction pursuant to 28 U.S.C. §1291. Briefing is complete and oral argument, requested by all parties, has yet to be scheduled.

Shortly after filing the Sixth Circuit appeal, the Petitioners filed a motion for injunction pending appeal in the district court, which did not respond. The Petitioners filed a similar motion with the Sixth Circuit before the appellate briefing was complete.

A panel of three circuit judges issued a ruling (App. 2a) denying injunction, finding:

> Loriz has a likelihood of success on appeal. The court must ultimately decide whether this case is more analogous to *Williamson County Reg'l Planning Comm's v. Hamilton Bank*, 473 U.S. 172, 186 (1985), or *Montgomery v. Carter County*, 266 F. 3d 758, 766-768 (6th Cir. 2000). Loriz has not, however, shown irreparable harm. Loriz made the laudable decision to move the family away from the danger

> posed by a stray hunter's bullet.[1] Having moved the family away, Loriz now faces economic harm. Mere economic damages, however, do not constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Therefore the motion for an injunction pending appeal lacks merit." App. 2a-3a.

The order went on: "The court notes that the responses of counsel in this case were distinctly deficient." Only Ridge Wind and the County responded; the State, which authorizes all shooting adjacent to the Loriz home, and the Judges did not oppose the injunction. The responses provided no facts or affidavits and merely asserted in two paragraphs or less that Loriz was not likely to succeed.

Loriz moved the appellate court to reconsider the order. Again only the County and the Ridge Wind Defendants responded, arguing that Petitioners could avoid irreparable harm by maintaining their property after shooting range business hours (i.e., chainsaw brush along 2500 feet of fence after dark) or by asking their neighbor to cease shooting operations for a while. The Sixth Circuit denied the Loriz reconsideration motion as "not well taken." App. 1a.

Petitioners now raise important questions as to the availability of injunctions to takings plaintiffs who demonstrate a likelihood of success on the merits of their federal claims. This petition need not delay a circuit court ruling on the merits of the case below as the merits are presumed likely to succeed and not in question here. Rather than seeking an interlocutory appeal of the injunction denial, Petitioners challenge the order as untenable on its face. Therefore, this case allows the

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[1] Most of the projectiles are not bullets but lead shot fired from 12-guage shotguns. Shooters are sportsmen (not traditional hunters) paying to shoot at cage-raised quail placed in a field prior to shooting activities.

Court to focus on the irreparable harm and injunction issue with minimal review of the controversy below: because the defendants provided no competing harm issues requiring a balancing test the injunction denial rests exclusively on whether a takings plaintiff can suffer irreparable harm.

Although well-focused, this case raises questions of constitutional import that potentially impact all private property owners. In takings cases, harm is directly tied to the just compensation guarantee, which, through precedents like *Williamson County*, is invoked to deny injunction and dismiss takings plaintiffs to state court, often without consideration for violations of more than the Just Compensation Clause of the Fifth Amendment.

If property owners, forced to flee their home to avoid the personal threat of illegal, state-sanctioned shotgun fire, are barred from injunction pursuant to *Sampson v. Murray, supra,* then can any citizen secure an injunction against improper takings? Is this bar consistent with fundamental common law rights, Supreme Court precedent and decisions of other circuits? Is this order representative of a greater problem — that federal courts are failing to recognize takings that violate something more than the Just Compensation Clause of the Constitution?

REASONS FOR GRANTING THE WRIT

This Court has long held that some governmental takings are unconstitutional, no matter what, when or how compensation is made. Such takings can "inflict irreparable and permanent injury" in the early words of this Court. *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872). Yet the predominance of a post-deprivation compensation remedy in recent takings

cases, guaranteed through the Just Compensation Clause, has made injunction and other federal court remedies largely unavailable to victims of unconstitutional takings who also seek damages.

In practice, state governments may deprive citizens of property with no due process if the deprivation is construed as a taking for which compensation is guaranteed. Consideration of uncompensable damage is noticeably absent from federal court rulings that dismiss claims to state court or deny injunction based on compensation guarantees. The resulting body of case law is plagued with conflict and uncertainty for takings victims seeking both economic and equitable relief.

The result is seen in the instant case. A circuit court has found that a physical invasion taking for a purely private use — commercial, state-licensed shooting operations that violate criminal firearms statutes — is wholly compensable and causes no irreparable constitutional violation despite the court's recognition that the taking endangered the Petitioners and their children.

The decision below finds no support in this Court and other circuits for equating the purely economic deprivation of a paycheck in *Sampson v. Murray, supra,* to a dangerous physical invasion of residential property that degrades the entire bundle of property rights. As such, review of this case may address the question of whether privacy and security interests in using residential property can be irreparably harmed.

Review of this case will allow the court to clarify its suggestion in *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528 (2005) that due process questions as to the authority of government to appropriate property should logically come prior to a just compensation determination. Federal courts have denied injunction and dismissed due process claims related to takings by invoking *Williamson County,* regardless of whether the taking

liamson County, regardless of whether the taking was regulatory or *per se*. This intertwining of all Fifth Amendment guarantees into the Just Compensation Clause, which only recognizes economic harm, may need untangling.

Review of this case will also allow the court to reconcile two property precedents: convicted drug offenders are entitled to pre-deprivation due process in the form of notice and hearing prior to seizure of real property pursuant to *U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993) but law-abiding citizens are entitled to no process other than state compensation remedies if the deprivation is ostensibly a taking pursuant to *Williamson County*, even if it is an unannounced, illegal physical invasion of a home.

Finally, the order below may have the disturbing practical effect of creating an exemption to injunction for defendants who act so egregiously that they force takings victims to flee their homes for fear of bodily injury. On its face, the challenged order holds that a family who is shot off their own property is not entitled to injunction. This veers sharply from fundamental laws of equity and warrants the exercise of this Court's supervisory powers.

I. THE QUESTION OF WHETHER ECONOMIC COMPENSATION IS THE EXCLUSIVE REMEDY FOR A TAKING REMAINS UNSETTLED

This Court was asked to address the issue of whether equitable relief is unavailable as a matter of law to takings plaintiffs in the IOLTA interest case *Brown v. Legal Foundation of Wash.*, 538 U.S. 216 (2003). The Court found that no taking occurred and "it is therefore unnecessary to discuss the remedial question presented in the certiorari petition." *Ibid*, at 239. The question remains unsettled.

The federal courts are courts of law *and* equity.

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited .... Unless a statute ... restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503.

in *Weinberger v. Romero-Barcelo,* 456 U.S. 305, at 313 (1982) quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

Federal court injunction denials based on a statutory bar are few; a First Circuit injunction denial on statutory grounds was reversed by this Court in *Weinberger v. Romero-Barcelo, Ibid.* To the contrary, the statute under which many takings claims are brought, 42 U.S.C. § 1983, "creates a duty to refrain from interference with the federal rights of others, and provides money damages and injunctive relief for violation of that duty" as stated by Justice Scalia, in his concurrence on *Monterey v. Del Monte Dunes*, 526 U.S. 687, 723 (1999). Consideration of § 1983 is noticeably absent from circuit court rulings denying injunction for takings.

This Court agreed long ago that "prevention of impending injury by unlawful action is a well recognized function of courts of equity." *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925). And that "[t]he right of a citizen to the protection of property from destruction by violence should be, and is, zealously guarded by the courts." *Merrimack River Savings Bank v. City of Clay Center,* 219 U.S. 527, 528 (1911). Yet when unlawful action is construed as a taking, as in the instant case, this "well recognized" function is no longer "zealously guarded."

Today, the post-deprivation economic remedy embodied in the Just Compensation Clause so dominates takings law that plaintiffs' cries of irreparable injury go unheard.

A. Supreme Court Holdings: Injunction is Uncertain for Plaintiffs Seeking Both Equitable and Economic Relief for a Taking

"Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) at 1016. *Monsanto* established what has been interpreted as a federal anti-injunction rule for takings guaranteed under the Tucker Act. It's applicability to local and state takings claims has been questioned but enforced in circuit court decisions, albeit inconsistently.

Prior to *Monsanto*, the Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59 (1978) addressed the issue of equitable relief for federal government takings by holding that the Declaratory Judgment Act "allows individuals threatened with a taking to seek declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained." *Ibid* at 71.

One case holds that a taking cannot be enjoined, the other that federal courts should enjoin before unconstitutional action causes irreparable harm. The difference between the two is readily apparent but it is an inquiry district courts fail to pursue in their haste to dismiss takings cases to state court — when is a taking unlawful or in violation of more than the Just Compensation Clause and likely to cause uncompensable harm?

This inquiry is crucial. However, it is not embodied in an authoritative test and therefore is ignored and instead ripeness is the first inquiry for federal plaintiffs raising takings claims (as in the district court ruling below). Even when a takings claim is likely to succeed in federal court (as acknowledged in the challenged order), injunction is unavailable due to the premise that damage from even an unconstitutional taking is inherently and wholly compensable.

Supreme Court cases consistently authorize injunctions for facial challenges, as affirmed by *Babbit v. Youpee*, 519 U.S. 234, 242-43 (1993). Those holding that takings can be enjoined rely on this case, as did the Fifth Circuit: "*Babbit* lends support to the conclusion that *Monsanto* and *Williamson County* do not categorically prohibit such relief for takings claims..." *Washington Legal Found. v. Tex. Equal Access to Justice Found.* 270 F.3d 180 (5th Cir. 2001).

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980), the Court found a Florida law unconstitutional and granted equitable relief. In *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998), a challenge of the Coal Industry Retiree Health Benefit Act, the plurality concluded that the district court had equitable jurisdiction because a Tucker Act proceeding would be futile; therefore, "the declaratory judgment and injunction sought ... constitute an appropriate remedy under the circumstances." *Ibid* at 522.

Supreme Court law is internally consistent, although its application by the circuit courts is not. Equitable relief is available to takings plaintiffs challenging the constitutionality of an action or ordinance affecting a taking. But the question of whether a plaintiff seeking both equitable and economic relief can secure an injunction is not resolved by these cases.

B. Circuit Court Conflicts: *Williamson County* and the Just Compensation Guarantee Create a Baffling Hurdle for Uncompensable Harm

In circuit courts, the *Williamson County* ripeness test is invoked not only to dismiss claims for compensation, but also to deny injunctions on the basis that an unripe taking cannot be enjoined. *Pharm. Care Mgmt. Ass'n v. Rowe,* 429 F.3d 294 (1st Cir. 2005) ("Typically, no injunctive relief claim based on taking would be ripe until state compensation remedies were exhausted" at n11).

This is both ironic and troubling. If an injunction is needed to prevent *uncompensable* damage how could such relief be considered unripe for *lack of compensation*? Clearly, something is amiss.

Despite the anti-injunction precedents embodied in *Monsanto* and *Williamson County*, the availability of equitable relief varies from circuit to circuit, indicating no clear rule for injunction in takings cases.

1. Circuit Rulings Granting Injunction

The First Circuit granted an injunction in a taking case, holding that the *Monsanto* rule was waived by the appellants in *Phillip Morris v. Reilly*, 312 F. 3d 24 (1st Cir. 2002). The Second Circuit in *N.Y. Coastal P'ship, Inc. v. United States DOI*, 341 F.3d 112 (2003) entertained the argument that if a remedy at law is inadequate, an equitable remedy can be sought (dismissed for lack of standing).

A loosely related category of takings injunctions can be seen in circuit court cases based on the adequacy of post-deprivation remedies to justly compensate takings victims. These cases rely to varying degrees on the practicality standard of *Eastern Enter., supra: Washington Legal Found. v. Texas Equal Access to Justice Foundation, supra* (5th Cir. 2001) (injunction "substantively

viable" if "there is no mechanism for payment of just compensation"); *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002) at 819 (harm is not fully compensable if damages are complex); see also *Dominion Video Satellite Inc., v. Echo Star Satellite Corp*, 269 F. 3d 1149, 1156 (10th Cir. 2001); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613 (D.C. Cir. 1992) ("the district court should accept jurisdiction over takings claims for injunctive relief in the few cases where a Claims Court remedy is 'so inadequate that the plaintiff would not be justly compensated'" (citation omitted).)

The Ninth Circuit in *Schneider v. Cal. Dep't of Corr.*, 345 F. 3d 716 (2003) vacated and remanded inmates' takings claims for damages and injunctive relief under § 1983 to determine if withheld interest on an inmate trust account amounted to a taking.

2. Circuit Rulings Denying Injunction

But the Ninth Circuit in a real property case, *Daniel v. County of Santa Barbara*, 288 F. 3d 375 (9th Cir. 2002), denied injunction holding that "[D]amages, in the form of just compensation, are the normal remedy for a takings claim ... Indeed, it is the very essence of an ordinary takings claim that the property owner cannot prevent the governmental body from regulating or seizing the property, provided that just compensation is paid."

The Ninth relied on *Williamson County* in denying injunction but went on to cite an exception for facial challenges in *Yee v. City of Escondido*, 503 U.S. 519 (1992). If "the property owner's argument is that the municipality has no authority to adopt the ordinance" then "payment of compensation... cannot confer an authority that is otherwise lacking." *Daniel v. Santa Barbara, supra.* The premise that the legitimacy of a taking is an *exception* to *Williamson County*, as indicated

by the Ninth Circuit, rather than a *first-impression inquiry* is at the heart of this petition.

In *Greenfield Mills Inc. v. Macklin,* 361 F.3d 934 (7th Cir. 2004), a damaged plaintiff was denied injunction on the basis that only plaintiffs seeking "exclusively equitable relief" are entitled to injunction. *Daniels v. Area Plan Commission of Allen County,* 306 F. 3d 445 (7th Cir. 2002).

According to some circuits, an unlawful taking entitles a plaintiff to equitable relief and federal jurisdiction in theory but not in affirmative action. *Gordon v. Norton,* 322 F.3d 1213 (10th Cir. 2003) dismissed because the lawfulness of the action was not at issue; *Ramirez de Arellano v. Weinberger,* 745 F. 2d 1500 (D.C. Cir. 1984), vacated on other grounds.

Neither Supreme Court law nor circuit rulings definitively establish when injunction is available to takings plaintiffs seeking both equitable and economic relief. Even a meritorious claim that takings are improper will not entitle plaintiffs to equitable relief as demonstrated in the order challenged here.

II. WHEN DOES A TAKING CAUSE IRREPARABLE HARM?

While federal case law indicates that takings plaintiffs have the right to request pre-trial injunction, they are plagued by the same principles that attempt to bar injunction as a general remedy — that the availability of compensation proscribes injunction by establishing that all harm is ultimately compensable rather than irreparable. This premise assumes that the only Fifth Amendment guarantee at risk from a governmental taking is the Just Compensation Clause. If only economic harm can ensue from a taking, then the Due Process Clause has indeed been swallowed whole by just com-

pensation. And as demonstrated in the instant case and this Court's divided decision in *Kelo v. New London,* 545 U.S. 469 (2005), the Public Use Clause may rarely rise above its counterpart in just compensation.

For a pre-trial injunction motion to prevail it must demonstrate a likely meritorious constitutional claim and show that the movant will suffer irreparable harm. *Southwest Williamson County v. Slater.* 243 F.3d 270, 277 (6th Cir. 2001). Or as this Court states: "The bases for injunctive relief are irreparable injury and inadequacy of legal remedies." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541 (1987).

Circuit courts appear to be operating under the premise that so long as a just compensation remedy is available, all harm from a property deprivation is purely economic. This is difficult to reconcile with precedent that physical invasion takings can "inflict irreparable and permanent injury," *Pumpelly v. Green Bay Co.*(1872), *supra*, and that injunction may be necessary to protect property rights, *Hynes v. Grimes Packing Company,* 337 U.S. 86, 98 (1949).

In the case below, the Sixth Circuit relied on *Sampson v. Murray*, to deny injunction for a lack of irreparable harm:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U. S. App. D. C. 106 (1958).

Id. at 90. Relief for a withheld paycheck was guaranteed to the plaintiff in *Sampson* by the Back Pay Act.

The Sixth Circuit's reliance on *Sampson* suggests that the forced eviction of a family is somehow reparable.

Logically, in order for a taking to cause irreparable harm, it must violate a constitutional guarantee other than just compensation. For some constitutional violations, a likelihood of success on the merits dictates irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (establishing that a First Amendment deprivation was categorically irreparable). When other constitutional deprivations, such as denial of the Due Process or the Public Use clauses, categorically constitute irreparable harm is unclear. However, in *U.S. v. Lynah*, 188 U.S. 445, 479 (1904), this Court held: "[I]f property were seized or taken by officers of the government without authority of law ... there could be no recovery..." That is, an unauthorized taking cannot be compensated and is irreparable.

Most recent takings cases have turned on the availability of a compensation remedy. A test for when a taking degrades other constitutional guarantees and causes irreparable harm is wanting.

A. When Does a Denial of Due Process Constitute Irreparable Harm?

The challenged order inherently recognized a threat to the Petitioners' life and liberty but still considered all harm to be economic. This is difficult to square with the Due Process Clause.

Parrat v. Taylor, 451 U.S. 527 (1981), holds that random, unauthorized acts by state officers require no pre-deprivation due process. This principle, despite its basis in random action, was incorporated into *Williamson County* to hold that until state compensation is sought, no process is due a deprived property owner. As a result, due process has been bundled into the *William-*

son County ripeness test. The result: federal courts need not inquire into due process injuries associated with a taking.

But this Court suggested that due process inquiries should logically come before questions of deprivation and compensation in *Lingle*, *supra*. The authority of a government action affecting a taking should be questioned first and if it violates due process "that is the end of the inquiry. No amount of compensation can authorize such action." *Ibid*. If no amount of *compensation* can authorize the action, the deprivation is logically *uncompensable* and therefore subject to injunction.

The standard for determining what process is constitutionally due was established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the process due must come "at a meaningful time and in a meaningful manner." *Ibid* at 333. "Our precedents establish the general rule that individuals must receive notice and be heard before the Government deprives them of property." *U.S. v. James Good Real Property*, 510 U.S. at 47. In that case, this Court held that criminals, unlike law-abiding takings victims, are entitled to notice and a meaningful hearing before their residential property is seized.

"Procedural due process rules are meant to protect persons not from deprivation but from the mistaken or unjustified deprivation of life, liberty, or property." *Cary v. Piphus*, 435 U.S. 247, 266 (1978). But with no inquiry into the justification for a taking prior to compensation considerations, due process is pre-empted. As this Court stated, "the availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure." *U.S. v. James Daniel Good* at 55. The same could be said of a state-controlled compensation hearing for an unjustifiable taking.

A case in point is presented in *Greenfield Mills Inc. v. Macklin, supra* (7th Cir. 2004). Plaintiffs sought dam-

ages and injunctive relief for due process and takings violations associated with an inverse physical invasion. After dismissing the takings claim for lack of ripeness, the court dismissed the plaintiffs' due process claims, holding that "the *Williamson County* exhaustion requirement applies with full force to due process claims (both procedural and substantive) when based on the same facts" that create the taking. In short, *Williamson County* pre-empted any due process analysis.

Due process may require more than compensation. "To the end that the taking shall be shown to be within its authority," this court stated in *Cincinnati v. Vester*, 281 U.S. 489, 448 (1930) the government body "is called upon to specify definitely the purpose of the appropriation." When, as in the instant case, the government officials neither recognize the taking nor justify it after years of deprivation, due process is implicated.

The Sixth Circuit's decision in *Warren v. City of Athens,* 411 F.3d 697 (6th Cir. 2005) held that government actions to impede the use of property without a hearing substantiated a violation of procedural due process that met the irreparable harm standard for permanent injunction. But that ruling flowed from the fact that the plaintiff's Fifth Amendment claims did not seek just compensation.

The circuit courts appear in need of a due process standard to apply when a victim of an unjustified taking (i.e., one that is effected by official policy but is unauthorized or unconstitutional) seeks remedies in both law and equity. As indicated by *Lingle*, such an unauthorized physical invasion taking would inherently cause an irreparable violation of the Due Process Clause regardless of whether post-deprivation compensation is paid.

B. When Does a Violation of the Public Use Clause Constitute Irreparable Harm?

Lingle also indicates that government action that fails to meet the "public use" requirement is impermissible, regardless of compensation. The line between a public and private use is blurred after this Court's decision in *Kelo*. Nonetheless, in his concurrence in that case, Justice Kennedy stated that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits are forbidden by the Public Use Clause." Such is the case here, as indicated by the Sixth Circuit's acknowledgement that a private-use takings claim is likely to succeed.

Recently, the Fourth Circuit, in *Presley v. City of Charlottesville*, 2006 U.S. App. LEXIS 24048 [*24], stated as a matter of fact that the constitution requires that "the government must demonstrate that the taking was for a public use." But when must a government demonstrate this? The idea that compensation can come after deprivation is established, but circuit rulings imply that the government has no obligation to honor the Public Use Clause prior to an inverse physical invasion.

Lingle suggests that violations of the Public Use Clause categorically cause irreparable harm. Even the Sixth Circuit standard for private-use takings, *Montgomery v. Carter County*, cited in the order below but largely ignored, holds that such a taking demands more than just compensation and must desist. *Ibid* 766-768. But another circuit court ruling, relying on *Williamson County*, indicates that even a challenge to the Public Use Clause is not ripe until a state compensation remedy is sought. *Covington Court, Ltd. V. Village of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996)(concluding that a plaintiff who contends taking was improper because it was done for a private purpose must exhaust state

remedies before bringing suit in federal court).

If *Williamson County* is allowed to drain the Public Use Clause of any constitutional protections independent of compensation, as it has in the Seventh Circuit, injunction against this constitutional violation will be barred in federal court.

C. Does it Matter that Property is Physically Invaded without Notice?

This Court has also held that "[A] permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property — perhaps the most fundamental of all property interests." See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) and others in *Lingle v. Chevron U.S.A., Inc.*, *supra*.

The clear implication is that the loss of the right to exclude others is a property, liberty and security deprivation independent of economic costs; i.e., an uncompensable injury. According to the Fourth Circuit, a condemnor is entitled to take possession and enjoy his property, even prior to adjudicating the appeal of a condemnation. *Atlantic Seaboard Corp. v. Van Serkenberg*, 318 F. 2d 455 (1963), held that "to postpone the condemnor's enjoyment of the premises" would impose "upon the condemnor great, perhaps irreparable damage." Yet circuit courts do not recognize irreparable damage to the legal owners of property, denied all use and enjoyment by inverse physical invasion, until just compensation is sought. This seems inequitable.

This Court distinguishes permanent physical invasion takings from all others, particularly temporary, regulatory takings like that in *Williamson County*. A regulatory taking "does not give the government any right to use the property nor does it dispossess the

owner or affect her right to exclude others." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 1479 (2002). That Court held "it is not appropriate to treat cases involving physical takings as controlling precedents for the evaluation that there has been a 'regulatory taking' and vice versa." *Ibid.* And in *Palazzolo v. Rhode Island,* 533 U.S. 606 at 617-618 (2001), this Court held:

> Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations than cases alleging a taking based on a burdensome regulation. In a direct condemnation action, or *when a State has physically invaded the property without filing suit*, the fact and extent of the taking are known. ... A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied. (emphasis added)

Despite these cautions, federal courts routinely apply the *Williamson County* ripeness test not just to temporary regulatory takings but to plaintiffs who have already been physically dispossessed of property, such as the plaintiffs in *Greenfield Mills Inc. v. Macklin,* (7th Cir., *supra*). The circuit court found that those plaintiffs suffered a physical invasion taking but were barred from federal remedy for a lack of pursuing state compensation pursuant to a *Williamson County* test, albeit a modified test for physical takings.

Other circuits have adopted similar modified ripeness tests for physical invasion takings. *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F. 3d 87, 91 (1st Cir. 2003); *Daniel v. County of Santa Barbara*, *supra* at 382 (9th Cir.). These tests assume the first *Williamson* prong is met — that a physical invasion is a "final" deprivation. But these physical invasion victims are forced

to exhaust state inverse condemnation remedies for an "unripe" taking that has already dispossessed them of property.

A similar doctrine is developing in the Sixth Circuit. In *Coles v. Granville*, 448 F.3d 853 (2006) the court stated that despite Ohio's lack of an inverse condemnation statute, an adequate *Williamson County* compensation remedy is available in mandamus. The court specifically distinguished a Dickensian plaintiff from 10 years earlier in *Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 697 (6th Cir. 1996) and determined that even the Kruse family, which suddenly found their back yard removed by the government with no notice and an immediately declared unwillingness to pay, would now have adequate remedy by seeking condemnation proceedings through mandamus. Such a remedy may be adequate for a prospective regulatory taking, but the higher scrutiny paid *per se* physical invasions seems to require more.

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner," *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). If the state has a "categorical duty to compensate," giving that state an opportunity to say, "no, we don't have to compensate" through proceedings it controls seems contradictory and provides no meaningful compensation guarantee. Such an outcome conflicts with this Court's holding where "'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation) no matter how weighty the 'public interest' involved." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) at 1028 quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) at 426.

How can an actual physical invasion, in which the owner is already dispossessed of property, be unripe pursuant to a precedent addressing temporary, regulatory takings, which theoretically cannot dispossess the owner of property according to *Tahoe-Sierra, supra*? The Court may wish to consider whether *Williamson County* is closing too many federal court room doors.

Clear guidance on when inverse physical invasions cause irreparable harm is needed.

D. Does it Matter that the Property is a Family's Home?

In *U.S. v. James Daniel Good, supra*, this court stated an essential principle of constitutional limitations on interference with real property: "Individual freedom finds tangible expression in property rights. At stake ... are the security and privacy of the home and those who take shelter in it." If liberty interests are thus intertwined with residential property interests, unannounced physical invasions of a residential property, as in the instant case, could create liberty deprivations under the Due Process Clause.

The damage to non-economic security interests could be deemed greater for a family's home than for other property. This Court recognizes the "sanctity of the home" with regard to governmental intrusions under the Fourth Amendment. See *Payton v. New York*, 445 U.S. 573, 601 (1980). Is a home less sanctified because the government is enacting intrusions without properly invoking its policing powers by construing the intrusion as a taking? If the government authorizes acts so egregious that a property owner cannot step out his door without risk of injury, then the sanctity of that home is irreparably lost.

This Court also recognizes that continued occu-

pancy is a property interest that is protected by the Due Process Clause. *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982) (concluding that continued residency is a "significant interest in property" subject to due process protection.) If the government authorizes acts that force a family to flee their home, such an involuntary termination of occupancy would create an irreparable due process violation.

E. Does it Matter that the Home is Vacated?

When a property is taken by the government, the owner is no longer in control of the property, whether he still lives on the property or not. There is an inherent separation between the property and its rightful owner. The premise challenged here, that the Petitioner's removal of his family to avoid injury from state-sanctioned activities proscribes irreparable harm, seems illogical in this context. The order below offers no support for the premise.

The instant case presents government action that so threatened a family that it affected a *de facto* eviction of the Petitioners from the home they own. Evicted tenants must receive notice and an opportunity to be heard prior to being evicted. *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972). Logically, an eviction without notice and a hearing (relating directly to the eviction) could be enjoined for causing an irreparable deprivation under due process.

In *Loretto*, this Court held: "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." *Id.* at 436-437. Plaintiffs already dispossessed of property are already irreparably harmed.

F. Does it Matter that Multiple Claims are Raised under § 1983?

The challenged order addresses only the Petitioners' takings claims. Absent from consideration here and in most circuit court injunction rulings is the authority invoked by § 1983 to vindicate multiple constitutional rights through both equitable and legal remedies.

Like the plaintiff in *Monterey v. Del Monte Dunes, supra*, Petitioners "do not seek just compensation *per se* but rather damages for the unconstitutional denial of such compensation" and many other considerable constitutional deprivations. *Id.* at 710. A § 1983 action is not an inverse condemnation suit.

When "the government not only denies liability but fails to provide an adequate remedy ... the analogy to ordinary condemnation procedures is simply untenable." *Id.* at 712.

Likewise the application of *Sampson v. Murray's* paycheck remedy to multiple constitutional violations inherent in this case fails. When viewed through the prism of § 1983, as Justice Scalia recommends (*Monterey* concurrence at 724), shifting focus from the single ray projected by a takings claim, the challenged order honors neither the Constitution nor U.S. Code.

III. WHY THE INJUNCTION DENIAL IS WRONG

The Sixth Circuit found that Petitioners face "[m]ere economic damages" because they "made the laudable decision to move the family away" from the danger of trespassing shotgun fire. This conclusion is not only incorrect, it encourages defendants to avoid injunction by acting so egregiously that they force citizens to flee their homes.

This incorrect order is driven by the premise that damage to property is purely economic and can never be irreparable.

In *Sampson*, adequate compensatory relief for a withheld paycheck was available through the Back Pay Act. The instant order assumes that "adequate compensatory or other corrective relief" is available for the Petitioners but does not say how. *Ibid.* This assumption is erroneous for a number of reasons.

A. Petitioners' Loss of Due Process Guarantees is Irreparable

The order below indicates that the Petitioners are endangered by the challenged state activity. The court characterized moving the family from the threat of a stray projectile as "laudable." This is clearly an acknowledgement of a threat to a life and liberty interest protected by the Due Process Clause. The circuit court errs, however, in holding that moving from the property somehow mitigates the liberty deprivation. A property owner, whether a resident or not, should have the right to walk on his property without fear of being shot while he holds title to the land.

By relying on *Sampson v. Murray*, the Sixth Circuit assumes Just Compensation will guarantee that damage is purely economic. This is also in error. Because Ohio has no inverse condemnation statute, due process is inherently denied to a physical invasion takings victim no matter what compensation may await. While Ohio mandamus may be an adequate remedy for a *Williamson County*-style regulatory taking (although we question the Sixth Circuit's conclusion issued in *Coles v. Granville, supra*), the notice and speedy compensation required by due process prior to a physical

invasion taking[2] cannot be satisfied by a generic mandamus statute that may or may not win a condemnation hearing. Such a lack of either notice or a guaranteed statutory remedy prior to invasion irreparably denies due process.

B. This Taking Is Not Authorized By Law

Although there is no inverse condemnation statute, Ohio law is not silent as to matters in this case. The Ohio Constitution holds that, except during exigencies and for road appropriations, "where private property shall be taken for public use, a compensation therefor shall *first* be made in money." (emphasis added.)

Ohio law also specifies the types of appropriations each local government entity can make. Neither the Butler County Board of Zoning Appeals (a non-legislative agency) nor the Chief of the Division of Wildlife are authorized to physically appropriate property. County appropriations through its commissioners are limited (by ORC 307.08) and do not include the right to take private property for commercial recreational purposes. The State of Ohio can appropriate property but only through the director of transportation, a conservancy district or a sanitary district pursuant to Chapter 163 of Ohio Revised Code.

While no statute authorizes the taking in this case, at least one statute restricts it. ORC 929.05, legislation intended to preserve agricultural land, prohibits the taking of 10 percent or 10 acres of any single agricultural property. The Petitioners' 45 acres are zoned agri-

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[2] *Reetz v. Michigan*, 188 U.S. 505, 509 (1903) (declaring that a publicly available statute may be sufficient to provide notice); *Bragg v. Weber*, 251 U.S. 57, 58 (1919): "where adequate provision is made for certain payment of the compensation without unreasonable delay the taking does not contravene due process of law."

cultural and were actively being reforested until shot trespass damaged or destroyed the trees.

The shooting that forced "the laudable decision to move the family away from the danger posed by a stray hunter's bullet," as stated in the order, is entirely prohibited by Ohio law with equivalents in every other state. Ohio Revised Code 2923.16.2 makes knowingly shooting into the property of another a crime; the loss of this legislated protection provides the basis for the Petitioners' equal protection claims.

As stated in *Lingle, supra*, "no amount of compensation can authorize" an impermissible taking. As such this impermissible taking is uncompensable and is inherently enjoinable.

The taking is also impermissible because it violates the Public Use Clause. The ruling below found that the Petitioners are likely to succeed on their claim that their property was taken for a purely private use. This meritorious claim implies an inherent violation of the Public Use Clause. Such a violation has no guaranteed compensation, and *Montgomery, supra* (cited but otherwise ignored by the circuit court) holds that such a taking is "unconstitutional regardless of whether just compensation is paid" and must desist. A private-use taking claim that is likely to succeed substantiates irreparable harm.

C. § 1983 is Relevant

The Sixth Circuit also failed to recognize any of the Petitioners' claims other than the takings claim. The Petitioners have also been practically and prospectively denied the legislated protections of criminal firearms statutes that prohibit repeatedly and knowingly shooting into the property of another. The shooting also con-

stitutes a state-created danger. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062-63 (6th Cir. 1998).

Perhaps more compelling is the Petitioners' claim, documented in attachments to their complaint, that BZA member Tom Bevington demanded the removal of Mike Loriz from a public hearing at which the shooting range was expanded in blatant violation of his First Amendment rights. He was removed from the hearing by an armed deputy before being allowed to speak. "It is well recognized that it is constitutionally impermissible to terminate even a unilateral expectation of a property interest in a manner which violates rights of expression protected by the First Amendment ... Even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris*, 888 F.2d 371 (6th Circuit 1989).

Because an expansion of the taking occurred in violation of the First Amendment, irreparable harm is mandated per *Elrod v. Burns*, *supra* at 373.

This Court has held, when more than one constitutional violation is asserted, "we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). The Petitioners' due process, state-created danger, freedom of speech and equal protection claims should not be relegated to serve as wallpaper for a takings claim.

The case below is not a simple inverse condemnation suit but a quintessential § 1983 case. State and county officers, conspiring with a sitting county judge (Defendant Connaughton) and his clients (Ridge Wind), seized the Petitioners property by shotgun fire, endangering the petitioners and the public and violating multiple criminal statutes and constitutional guarantees in doing so. These were not random acts: the licenses and

permits have been repeatedly re-issued with full knowledge of the damage to the Petitioners. Such damage is irreparable and warrants injunction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Hanning Loriz
Cara Francke Loriz
Petitioners *Pro Se*
PO Box 923; 11 Marc Street
Shelter Island, NY 11964-0923

NOVEMBER 2006

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[1] Petitioners' timely amended complaint was barred by the District Court and the motion to amend was denied with the dismissal of all claims. Attachments to the original complaint documenting claims are omitted here.

No. 06-3427

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL HANNING LORIZ; CARA FRANCKE LORIZ	)	FILED
	)	OCT 10
	)	2006
Plaintiffs-Appellants,	)	
	)	
v.	)	ORDER
	)	
JOHN B. CONNAUGHTON, et al.,	)	
	)	
Defendants-Appellees.	)	

Before: MOORE, COLE, AND GILMAN, Circuit Judges.

Michael and Cara Loriz move for reconsideration of this court's order denying their motion for an injunction pending appeal.

Upon consideration, the court concludes that the motion is not well-taken. The motion to reconsider is denied.

ENTERED BY ORDER OF THE COURT

s\Leonard Green
Clerk

No. 06-3427

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL HANNING LORIZ; CARA FRANCKE LORIZ	)	FILED
	)	AUG 18
	)	2006
Plaintiffs-Appellants,	)	
	)	
v.	)	ORDER
	)	
JOHN B. CONNAUGHTON, et al.,	)	
	)	
Defendants-Appellees.	)	

Before: MOORE, COLE, AND GILMAN, Circuit Judges.

Plaintiffs-appellants Michael and Cara Loriz (Loriz) move for an injunction pending appeal in this private civil rights action. 42 U.S.C. § 1983. The four factors to be considered concerning such a motion are: (1) the likelihood of success on appeal; (2) the existence of irreparable harm; (3) a lack of harm to others; and (4) whether the public interest favors injunction. See Grutter v. Bollinger, 247 F. 3d 631, 632-33 (6th Cir. 2001) (order).

Loriz has shown a likelihood of success on appeal. The court must ultimately decide whether this case is more analogous to *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), or *Montgomery v. Carter County*, 266 F. 3d 758, 766-768 (6th Cir. 2000). Loriz has not, however, shown irreparable harm. Loriz made the laudable decision to

move the family away from the danger posed by a stray hunter's bullet. Having moved the family away, Loriz now faces economic harm. Mere economic damages, however, do not constitute irreparable harm. [*p. 2] *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Therefore the motion for an injunction pending appeal lacks merit.

The court notes that the responses by counsel in this case were distinctly deficient. The response from the public official defendants attempted to incorporate a district court document, a practice disfavored by the court. Counsel for the private defendants provided neither a docket sheet nor a narrative description of the current proceedings in the pending state court action between these parties. Such deficiencies are not what the court expects from counsel appearing before the Sixth Circuit. The court trusts that counsel will do a better job when filing their briefs.

The motion for an injunction pending appeal is denied.

ENTERED BY ORDER OF THE COURT

s\Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Michael Hanning Loriz; *et al.*,	)	FILED
	)	FEB 24 2006
Plaintiffs,	)	
	)	
vs.	)	Case No.
	)	1:06-cv-306
John B. Connaughton, *et al.*,	)	
	)	
Defendants.	)	
	)	

Order Adopting Reports and Recommendations

On December 29, 2005, United States Magistrate Judge Timothy S. Black issued three Reports and Recommendations in this matter. He recommended that the Court grant the following motions: a motion to dismiss by Defendants Young, Valen, and Connaughton (Doc.14); a motion to dismiss by Defendants Christopher Keller, Charles Keller, Simmons, and Ridge Wind Quail Hunts, LLC (Doc. 19); and a motion for judgment on the pleadings by Defendant Gray (Doc. 25). The Magistrate Judge further recommended that the Court dismiss *sua sponte* Plaintiffs' claims against all non-moving parties and close this action. He recommended that Plaintiffs' motion to amend their complaint (Doc. 38) and their motion for supplemental jurisdiction (Doc. 44) be denied.

Plaintiffs have objected to each of the reports and recommendations. Their objections do not alter the Court's conclusion, however, considering the matters to which objections have been raised *de novo*, that the Magistrate Judge's recommendations are entirely correct. Accordingly, the Court hereby **ADOPTS** the

Reports and Recommendations and **GRANTS** the dispositive motions by Defendants (Doc. 14, Doc. 19, and Doc. 25). The Court [*p.2] further **DISMISSES** *sua sponte* Plaintiffs' claims against non-moving Defendants and **CLOSES** this action. Plaintiffs' motions to amend their complaint (Doc. 38) and for supplemental jurisdiction (Doc. 44) are hereby **DENIED**.

IT IS SO ORDERED.

/s/Sandra S. Beckwith, Chief Judge
United States District

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Michael Hanning Loriz; *et al.*,	)	FILED
	)	DEC 29 2005
Plaintiffs,	)	
	)	Case No.
vs.	)	1:06-cv-306
	)	
John B. Connaughton, *et al.*,	)	Beckwith, C.J.
	)	Black, M.J.
Defendants.	)	
	)	

REPORT AND RECOMMENDATION[2] THAT DEFENDANTS' MOTIONS TO DISMISS (Docs. 14, 19) AND FOR JUDGMENT ON THE PLEADINGS (Doc. 25) BE GRANTED; THAT ALL CLAIMS AGAINST THE NON-MOVING DEFENDANTS BE SUA SPONTE LIKEWISE DISMISSED; AND THAT THIS BE CASE CLOSED.

This civil action is before the Court on defendants' motions to dismiss and for judgment on the pleadings (docs. 14, 19, 25), and the parties' responsive memoranda (docs. 21, 22, 27, 30, 34, 41.) Plaintiffs Michael and Cara Loriz initiated this action on May 4, 2005 by filing a *pro se* complaint against 25 public and private sector individuals, alleging that the Defendants have violated the Plaintiffs' constitutional rights. (Doc. 1.)

I. BACKGROUND

In 1995, Plaintiffs purchased a 45 acre farm in Butler County, Ohio. (Doc. 1, ¶ 5.) Plaintiffs con-

[2] Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

structed a 5,000 square foot home, along with a barn and large shed on the -2- property. *Id.* Plaintiffs also established a hardwood veneer tree farm on their property and converted their basement into a professional woodworking shop. (*Id.* at ¶ 9.)

Shortly after Plaintiffs purchased the land, neighboring Defendants Charles Keller and Michael Simmons applied for a zoning variance in order to operate a commercial bird hunting operation on the lot adjacent to Plaintiffs' property. (*Id.* at ¶ 6.) Subsequently, the Ohio Division of Wildlife approved various applications by Keller and Simmons to commence operation of a hunting business, which operations opened in January 2001. (*Id.* at ¶ 11.)

According to Plaintiffs, the Butler County Zoning Department applied for temporary restraining order to halt the operation of the business in March 2001, but the petition was denied. (*Id.* at ¶ 12.)

Accordingly, in March 2001, Plaintiffs filed a civil action in the Court of Common Pleas of Butler County, Ohio, against Keller and Simmons and others, asserting that the operation of the shooting range constituted an unlawful nuisance and claiming further a loss of the quiet enjoyment of their property. (*Id.* at ¶ 14.) This state court litigation remains pending and presents an appropriate forum for the resolution of Plaintiffs' claims.

Plaintiffs further allege that in April 2001, the Butler County Board of Zoning Appeals ("the BZA") found that Keller and Simmons were in violation of county zoning resolutions. (*Id.* at 15.) Nevertheless, on July 17, 2001 and February 23, 2003, the BZA approved conditional use permits to allow the shooting range to continue to operate. (*Id.* at 16.) [*p.-3-]

Although the BZA established conditions for the shooting range, including requiring a 300 foot buffer zone between the Plaintiffs' property and the range activities (*id.* at 35), Plaintiffs assert compellingly that

the BZA-imposed conditions are wholly insufficient to protect Plaintiffs and their property.

Plaintiffs accordingly appealed the decision of BZA to the Butler County Court of Common Pleas, which court remanded the matter to the BZA for further proceedings and ordered the BZA thereafter to submit written findings of fact to the Court of Common Pleas. (Doc. 19, Ex. 3.) On remand, the BZA heard additional testimony, and, following the hearing, the BZA filed "Conclusions of Fact" with the Court of Common Pleas.

On April 11, 2003, the Court of Common Pleas affirmed the BZA's decision. Plaintiffs appealed the decision of the Court of Common Pleas, and, on December 8, 2003, the Ohio Court of Appeals for the Twelfth District affirmed the decision of the Court of Common Pleas upholding the BZA's decision to grant a conditional use permit to operate the shooting range.

On May 4, 2005, Plaintiffs initiated the instant action.

Plaintiffs' principal claim in the instant action is that the Butler County Board of Zoning Appeals and the Ohio courts improperly approved a commercial shooting range to be operated adjacent to Plaintiffs' residence and tree farm. Thus, Plaintiffs' complaint asserts claims against the owners of the shooting range and their attorney, the Ohio Court of Appeals Judges who presided over Plaintiffs' appeal, various Butler County officials, [*p.-4-] and the Ohio Wildlife Division Chief.[3]

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[3] The named defendants include: the operators of the commercial shooting range, Charles Keller, Christopher Keller, Michael Simmons, and Ridge Wind Quail Hunts, LLC, and their attorney, John B. Connaughton; the members of the Butler County Board of Zoning Appeals, Lee Steenken, Thomas Bevington, Gary Salman, John Zboril, Walt Filpot, and Alan Daniel; the Butler County Commissioners, Michael A. Fox, Gregory Jolivette, and Charles R. Furmon; and Judges of the Ohio Court of Appeals for the 12th Appellate

Plaintiffs are seeking compensatory damages, as well as declaratory and injunctive relief. Specifically, Plaintiffs' prayer for relief seeks the following:

> 1. Declaratory judgment establishing that the BZA approval of the subject shooting range was unlawful and unconstitutional and a permanent injunction against the BZA from permitting shooting range operations as conditional uses in the A-1 zone.
>
> 2. Permanent injunction against defendant Gray from permitting any shotgun shooting operations, public or private, including the subject shooting range;
>
> 3. A diligent and thorough investigation by the United States Attorney into corrupt practices within the Butler County Sheriff, Prosecutor, Judicial, and Executive departments;
>
> 4. Defendants pay Plaintiffs fair market value (prior to the shooting range) for residence and property, and assume all liability for lead contamination of Plaintiffs' property;
>
> 5. Money damages (incidental and punitive) in the amount of $10,000,000.
>
> 5.(sic) Any further relief the Court deems appropriate. (Doc. 1, p. 12.)

Defendants Valen, Young, Powell and Connaughton have filed a motion to dismiss (doc. 14), and Defendants Keller, Keller, Simmons, and Ridge Wind Quail Hunts, L.L.C. [*p.-5-] have filed a motion to dis-

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District, the Honorable Anthony Valen, the Honorable William W. Young,, and the Honorable Steven W. Powell; Butler County Warrant Officer, Thomas Turner; Butler County Sheriff, Richard K. Jones; Butler County Chief Deputy Sheriff, Anthony E. Dwyer; Butler County Prosecuting Attorney, Robin Piper; Butler County Assistant Prosecuting Attorney, Roger Gates; Butler County Chief Zoning Inspector, William Balinsinger; Butler County Zoning Inspector, James M. Fox; and Ohio Department of Natural Resources Wildlife Division Chief, Steven A. Gray.

miss (doc. 19), and Defendant Steven A. Gray has filed a motion for judgment on the pleadings (doc. 25). The briefing of these motions is complete, and each motion will be addressed in turn.

II. STANDARDS OF REVIEW

A.

On consideration of a motion to dismiss under Rule 12(b)(1), the Court must take all material allegations in the complaint as true, and the Court shall construe all of the allegations in the light most favorable to the non-moving party. *See United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir.), *cert. denied,* 513 U.S. 868 (1994).

Because Plaintiffs brings this case *pro se,* the Court liberally construes their allegations in their favor. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see also Williams v. Browman*, 981 F.2d 901, 903 (6th Cir. 1992) (*pro se* pleadings should be construed more liberally than pleadings drafted by lawyers). Indeed, "[a] pro se plaintiff's complaint is held to an especially liberal standard, and should only be dismissed for failure to state a claim if it appears 'beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000) (quoting in part *Estelle*, 429 U.S. at 106). The Court, however, "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

Where subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. *Moir v.*[*p.-6-] *Greater Cleveland Reg'l Trans. Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). "[T]he court is empowered to resolve factual disputes when subject matter jurisdiction is challenged." *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 918 (6th Cir. 1986). In resolving a factual jurisdictional issue under a Rule

12(b)(1) motion, the Court addresses the jurisdictional issue in the same manner as summary judgment issues, in that the moving party must demonstrate the absence of a genuine issue of jurisdictional fact. *Armbruster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

B.

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Where, as here, a motion for judgment on the pleadings is based on the argument that the complaint fails to state claim upon which relief may be granted, the Rule 12(c) motion is judged under the same standard of review as a Rule 12(b)(6) motion. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987). [*p.-7-]

III. ANALYSIS

A. Plaintiffs' Claims Under the Takings Clause Are Not Ripe And Should Be Dismissed Without Prejudice.

The central theme of Plaintiffs' complaint is that the approval and operation of the shooting range resulted in a taking of their property in violation of the Fifth Amendment. Their claim is essentially one of inverse condemnation.

However, all plaintiffs are required to first exhaust state administrative remedies for inverse condemnation, prior to filing a action under 42 U.S.C. § 1983. That is, "[i]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnston City,* 473 U.S. 172, 195 (1985); *see also*

Dawkins v. City of Utica, 1997 WL 176328, *7 (N.D.N.Y. 1997) ("As to plaintiff's takings claim, the court *sua sponte* conditionally dismisses that claim because it is not ripe.")

In *Williamson County,* the U.S. Supreme Court held that § 1983 claims based on alleged violations of the takings clause are not ripe until the plaintiff has either exhausted state law remedies for seeking just compensation for the alleged taking, or demonstrated that the state law procedures are inadequate. *Williamson County, supra,* 473 U.S. at 195; *see also Hammond v. Baldwin*, 866 F.2d 172, 179 (6th Cir. 1989) ("The plaintiffs have a state remedy to address the alleged damage to their property; and a suit under 42 U.S.C. § [*p.-8-] 1983 is inappropriate until a final decision of the state in an inverse condemnation action is entered against the plaintiffs.").

Because the Plaintiffs have not availed themselves of state-provided remedies by pursuing and completing a state court action seeking just compensation for the alleged inverse condemnation of their property, their instant action for claims of an unconstitutional takings is not yet ripe for adjudication. *Cap'n Hook Auto Parts Inc., v. Liverpool Township*, 773 F.Supp. 71, 74 (N.D. Ohio 1991); *Williamson,* 473 U.S. at 195.

Moreover, "[i]**f a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised sua sponte if not raised by the parties.**" *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 157 (6th Cir. 1992) (quoting *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990)) (emphasis supplied).

Accordingly, Plaintiffs' Fifth Amendment takings claims should be dismissed *sua sponte* without prejudice.

B. The Motion to Dismiss of Judges Anthony Valen, William Young, and Stephen Powell, and Attorney John B. Connaughton (Doc. 14) Should Be Granted.

Defendants Valen, Young and Powell, Judges of the Ohio Court of Appeals for the 12th Appellate District, presided over Plaintiffs' appeal of the decisions of the BZA and the Court of Common Pleas. [*p.-9-]

Plaintiffs allege that as a result of the proceedings before the Twelfth District Court of Appeals, the Judges violated the Plaintiffs' rights under the First, Fifth, and Fourteenth Amendments. Plaintiffs further allege that the Judges are all senior members of the Republican Party, that the zoning appeal "was effectively a political, rather than judicial, proceeding," that the Judges acted outside their judicial capacity, and that "the decision of the Judges places them in direct violation of Ohio Revised Code pertaining to firearms discharge."

As to Defendant Connaughton, Plaintiffs allege that his illegal conduct has resulted in the deprivation of Plaintiffs' First and Fifth Amendment rights. (*Id.* at ¶ 19.) Connaughton is a part-time county judge and a practicing attorney. Connaughton acted as an attorney for the shooting range operators during the zoning proceedings before the BZA. (Doc. 1, ¶ 16.) Plaintiffs allege, *inter alia*, that by acting as an attorney while at the same time serving as a part-time Ohio county judge, Connaughton breached an ethical of duty imposed by the Ohio Revised Code, the Code of Judicial Conduct, and Ohio's Code of Professional Responsibility. Plaintiffs further assert that Connaughton repeatedly perjured himself before the BZA, and made false statements to the common pleas and appellate courts. (*Id.* at ¶ 17.) Additionally, Plaintiffs assert that Con-

naughton witnessed his clients shoot maliciously into Plaintiffs' property. [*p.-10-]

i. Under the Rooker-Feldman Doctrine, the Court Lacks Jurisdiction over Plaintiffs' Claims Against the Defendant Judges and John Connaughton.

Under 28 U.S.C. § 1257, final judgments of state courts are entitled to receive full faith and credit from this Court, and the subordinate federal courts do not have jurisdiction to review these final judgments of state courts because the review of such determinations can be obtained only by the United States Supreme Court by writ of certiorari. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923) (an appeal through the state courts to the U.S. Supreme Court is the exclusive means by which a state court judgment may be reviewed for constitutional error); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 483-84 n.6 (1983). As noted in *Feldman*:

> Lower federal courts possess no power whatever to sit in direct review of state court decisions. If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial [of the claim] in a judicial proceeding. . . then the district court is in essence being called on to review the state court decision. This the district court may not do.

Feldman, 460 U.S. at 483-84 n.6.

Thus, pursuant to the *Rooker-Feldman* doctrine, district courts lack jurisdiction over challenges to the constitutionality of judicial acts in the courts of the several states.

Here, Plaintiffs are seeking a declaratory judgment setting aside the state courts' [*p.-11-] decisions

regarding the zoning of the shooting range. Such action is expressly prohibited by the *Rooker-Feldman* doctrine, and, as a result, this Court lacks subject matter jurisdiction over Plaintiffs' claims.

ii. Defendant Judges Have Absolute Immunity Barring Plaintiffs' Claims for Monetary Relief.

Furthermore, the defendant Judges are absolutely immune from individual liability for monetary relief for the performance of any "judicial act" unless there is a "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U S. 349, 362 (1978); *King v. Love*, 766 F.2d 962, 966-67 (6th Cir. 1985). Judicial immunity is properly invoked unless a judge "knows he lacks jurisdiction or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction." *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980).

In examining the functions normally performed by a judge, the Court of Appeals for the Sixth Circuit has recognized that "paradigmatic judicial acts," or acts that involve resolving disputes between parties who have invoked the jurisdiction of a court, are the touchstone for application of judicial immunity. *Johnson v. Belskis*, 2005 WL 2416557, *8 (S.D. Ohio 2005) (citing *Barrett v. Harrington*, 130 F.3d 246, 255 (6th Cir.1997)).

Here, each of the judges acted in his judicial capacity with regard to the plaintiffs when presiding over the zoning appeal. The judges sat on a three-judge panel [*p.-12-] and ruled on Plaintiffs' appeal from the decision of the trial court (and the BZA). Moreover, Plaintiffs were parties in the zoning litigation and dealt with the judges in connection with that litigation. Thus, because presiding over cases is a function normally performed by a judge, and because Plaintiffs dealt with each of the judges in his judicial capacity,

the judges' acts were judicial in nature. Accordingly, Plaintiffs' claims against the judges are barred because the judges enjoy absolute immunity.

iii. Plaintiffs' Complaint Fails to State a Claim Against the Defendant Judges and Defendant Connaughton.

42 U.S.C. § 1983 provides a civil cause of action to any citizen of the United States against any person who, under color of state law, deprives the citizen of "any rights, privileges, or immunities secured by the Constitution and laws of the United States." *See Christy v. Randlett,* 932 F.2d 502, 504 (6th Cir.1991) (citations omitted).

Thus, to succeed on a § 1983 claim, a plaintiff must prove two elements: (1) that he was deprived of a right secured by the Federal Constitution or laws of the United States; and (2) that he was subjected to this deprivation by a person acting under the color of state law. *See Searcy v. City of Dayton,* 38 F.3d 282, 286 (6th Cir.1994). "By its terms, § 1983 creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." *Gardenhire v. Schubert,* 205 F.3d 303, 310 (6th Cir.2000) (citing *Oklahoma v. Tuttle,* 471 U.S. 808 (1985)).

Here, Plaintiffs claim violations of various constitutional rights (*e.g.*, violations [*p.-13-] of the takings clause of the Fifth Amendment and violations of the due process clauses of the Fifth and Fourteenth Amendments). However, Plaintiffs do not allege that the Defendant Judges and/or Defendant Connaughton deprived Plaintiffs of a federally protected right.

As noted above, Plaintiffs allege that the Judges improperly decided the appeal of the decisions of the BZA and the Butler County Court of Common Pleas and that these rulings resulted in constitutional violations. Accordingly, Plaintiffs' claims against the Defendant Judges fail as a matter of law under § 1983

because such claims are barred on the basis of absolute judicial immunity. *See Johnson v. Belskis*, 2005 WL 2416557, *7 (S.D. Ohio 2005).

Furthermore, with respect to defendant Connaughton, Plaintiffs assert that he breached his ethical duty imposed by the Ohio Revised Code, the Ohio Code of Judicial Conduct, and the Ohio Code of Professional Responsibility by acting as an attorney while at the same time serving part-time as an Ohio county judge. Plaintiffs do not allege that defendant Connaughton's conduct in representing the shooting range operators deprived Plaintiffs of a federally protected right. Moreover, Plaintiffs make no allegation that defendant Connaughton was acting under color of law when he was representing the shooting range operators.

Under Ohio law, defendant Connaughton did not act unlawfully by acting as an attorney during his term as a part-time Ohio county judge. Pursuant to the Ohio [*p.-14-] Revised Code:

> A judge of a county court shall be disqualified from the practice of law only as to a matter pending or originating in that county court during the judge's term or office. ...

Ohio Rev. Code. Ann. § 1907.16 (B).

Additionally, Plaintiffs' allegations relating to defendant Connaughton's actions cannot result in civil liability under the Ohio Code of Judicial Conduct or the Ohio Code of Professional Responsibility. *See Code of Judicial Conduct Preamble* ("[The Judicial Code] is not designed or intended as a basis for civil liability or criminal prosecution."); *see also Fred Siegel Co., v. Arter & Hadden*, 85 Ohio St.3d 171 (1999) (a violation of the disciplinary rules does not, in itself, create a private cause of action.).

In any event, the allegations in Plaintiffs' complaint fail to establish that defendant Connaughton

was acting under color of law and/or that he deprived Plaintiffs of a federal right.

Accordingly, Plaintiffs' claims against the defendant Judges and attorney Connaughton should be dismissed.

C. The Motion to Dismiss of Defendants Keller, Keller, Simmons and Ridge Wind Quail Hunts, LLC (Doc. 19) Should Be Granted.

Plaintiffs' complaint alleges that the operation of a bird hunting business by defendants Keller, Keller, Simmons, and Ridge Wind Quail Hunts, L.L.C. (hereinafter the "Ridge Wind Defendants") amounted to a Fifth Amendment taking and deprived [*p.-15-] Plaintiffs of their property. Plaintiffs' further assert that the Ridge Wind Defendants and others conspired to deny Plaintiffs their due process rights under 42 U.S.C. § 1983.

i. *Rooker- Feldman*

As noted above, the *Rooker-Feldman* doctrine "bars re-litigation of claims raised in state court proceedings as well as claims that are 'inextricably intertwined' with the claims asserts there." *Pieper v. Am. Arbitration Ass'n*, 336 F.3d 458, 460 (6th Cir. 2003). Moreover, "[w]here federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive that the federal proceeding is, in substance, anything other than a prohibited appeal of the state-court judgment." *Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998).

Here, Plaintiffs' complaint is seeking a "declaratory judgment establishing that the BZA approval of the shooting range and Judge Stapelton's ruling in support of the BZA were unlawful and unconstitutional." (Doc. 1 at ¶ 59.) However, the Ohio Court of Appeals for the Twelfth District affirmed the decision

granting the Ridge Wind Defendants a conditional use permit, and, accordingly, the *Rooker-Feldman* doctrine bars this Court from re-litigating the decision reached by the Ohio Court of Appeals.

ii. *Plaintiffs' Complaint Fails to State a Claim for Conspiracy under 42 U.S.C § 1983.*

Plaintiffs assert that *Rooker-Feldman* is inapplicable because the state appellate court did not address the issue of whether the Ridge Wind Defendants were damaging Plaintiffs' property and depriving them of civil rights. However, even assuming that [*p.-16-] *Rooker-Feldman* does not preclude this Court from exercising jurisdiction, dismissal under 12(b)(6) is still warranted because the Ridge Wind Defendants are not state actors and the complaint fails to state a claim for conspiracy under 42 U.S.C. § 1983.

As noted above, in order to establish liability under 42 U.S.C. § 1983, the Plaintiffs must prove that they were deprived of rights secured by the Constitution by a person acting under color of state law. *See Searcy, supra,* 38 F.3d at 286. "The principal inquiry in determining whether a private party's actions constitute state action under the Fourteenth Amendment is whether the party's actions may be fairly attributable to the state." *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir. 1992). Here, it is undisputed that the Ridge Wind Defendants are not state actors.

However, Plaintiffs further assert that the Ridge Wind Defendants conspired with "others" to deny Plaintiffs their due process rights.

Private persons may be held liable under § 1983 if they willfully participate in a joint action with state agents. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Cooper v. Parrish*, 203 F.3d 937, 952 n.2 (6th Cir.2000); *Moore v. City of Paducah*, 890 F.2d 831, 834

(6th Cir.1989); *Hooks v. Hooks*, 771 F.2d 935, 943 (6th Cir.1985).

However, a complaint alleging that a private party is liable under § 1983 for conspiracy with a state actor "must be pled with some degree of specificity.... [V]ague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir.1987).

The Sixth Circuit has repeatedly held that "general" allegations of a conspiracy [*p.-17-] are insufficient to withstand a motion to dismiss. Recently, the Sixth Circuit dismissed a claim raising allegations similar to those in Plaintiffs' complaint:

> Plaintiffs have not asserted any facts to show that his conduct can be characterized as fairly attributable to the state under any of the tests articulated in *Tennessee Area Local,* 361 F.3d at 905. Nor have they alleged any specific facts to show that [the defendant's] involvement in the civil litigation and the criminal prosecution of [the plaintiff] was a cooperative or joint effort with state actors to deprive Plaintiffs of their civil rights. Other than general allegations of conspiracy to cause and influence a wrongful criminal prosecution, Plaintiffs make no allegations of joint, concerted activity to deprive Dallas of his civil rights.

Dallas v. Holmes, 2005 WL 1313801, at *5 (6th Cir. 2005).

Thus, simply stating in the complaint that a conspiracy was present is not enough to survive a Rule 12(b)(6) motion. *See, e.g., Spadafore v. Gardner*, 330 F.3d 849, 853 (6th Cir. 2003) (dismissing complaint because it lacked "the requisite degree of specificity"); *Morris v. Boyd*, 39 Fed. Appx. 281, 283-84 (6th Cir. 2002) (dismissing claim alleging conspiracy between

police officer and social worker who each allegedly gave false testimony, as plaintiff had not alleged an agreement between the two to do so); *Young v. Gundy*, 30 Fed. Appx. 568, 569 (6th Cir. 2002) (dismissing complaint where it contained only a "bare assertion of a conspiracy" but lacked factual support for such an assertion); *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 541 (6th Cir. 2002) (dismissing deficient complaint because "vague and conclusory allegations unsupported by material facts are insufficient to sustain a conspiracy claim under § 1983").

Here, Plaintiffs' complaint contains vague and conclusory allegations implying [*p.-18-] that a conspiracy existed. Moreover, Plaintiffs have not alleged any agreement and/or a joint concerted effort between the Ridge Wind Defendants and any state actor to deprive Plaintiffs of their civil rights. *Cf.* Doc. 1 ¶¶ 34 & 47.

Accordingly, Plaintiffs' conspiracy allegations are properly dismissed.

iii. Plaintiffs Cannot State a Claim for Failure of State Officials to Prosecute the Ridge Wind Defendants.

In their memorandum *contra* to the Ridge Wind Defendants' motion to dismiss, Plaintiffs argue that their due process rights were violated by the failure of state officials to prosecute the Ridge Wind Defendants. (Doc. 27, p. 11). However, the Fourteenth Amendment does not provide the right to have another individual prosecuted. *See Town of Castle Rock v. Gonzales*, 125 S.Ct. 2796, 2810 (2005) ("the benefit that a third party may receive from having someone else arrested . . . generally does not trigger protections under the Due Process Clause.")

Accordingly, Plaintiffs' allegations against the Ridge Wind Defendants fail to state a claim upon

which relief can be granted, and the Ridge Wind Defendants' motion to dismiss should be granted. [*p.-19-]

D. The Motion for Judgment on the Pleadings of Defendant Steven A. Gray (Doc. 25) Should Be Granted.

Plaintiffs' complaint alleges that defendant Gray, as Chief of the Division of Wildlife of the Ohio Department of Natural Resources, issued various permits to the Ridge Wind Defendants with "no provision for public comment or any regard for the public safety, and are in accordance with neither State Law nor the chief's own regulations for safe operation." (Doc. 1 ¶ 49.)

Plaintiffs further allege that defendant Gray has "wrongfully failed to meaningfully investigate the range, correct any of the problems, or in any require the range to come into compliance with its own departments' regulations of State law." (*Id.* at ¶ 52.) Thus, Plaintiffs' contention is that defendant Gray's issuance of permits and licenses violated their Fourteenth Amendment Due Process rights and resulted in an unlawful taking in violation of the Fifth Amendment. (*Id.* at ¶ 53.)

Here, the crux of the allegations against Defendant Gray is that his actions resulted in an unlawful taking of Plaintiffs' property. However, as noted above, because a violation of the takings clause does not occur until just compensation has been denied, *see Williamson County,* 473 U.S. at 194 n.13, Plaintiffs must use available state procedures to seek such compensation before they may bring a § 1983 takings claim in federal court. *John Corp. v. City of Houston,* 214 F.3d 573, 581 (5th Cir. 2000).

Moreover, although Plaintiffs also allege substantive and procedural due process [*p.-20-] violations,

these claims are ancillary to the main issue (whether the granting of the permits and licenses constitutes a taking of the property) and, therefore, are not ripe for review at this time. *See Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 160 (6th Cir.1992) ("Until the state courts have ruled on the plaintiffs' inverse condemnation claim, this court cannot determine whether a taking has occurred, and thus cannot address the procedural due process claim with a full understanding of the relevant facts.").

Accordingly, defendant Gray's motion for judgment on the pleadings (doc. 25) should be granted.

IV.

Based on the foregoing, the undersigned **RECOMMENDS** that defendants' motions to dismiss (docs. 14 and 19) and for judgment on the pleadings (doc. 25) should be **GRANTED**; and defendants Anthony Valen, William Young, Stephen Powell, John Connaughton, Charles Keller, Christopher Keller, Michael Simmons, Ridge Wind Quail Hunts, LLC, and Steven A. Gray should be **TERMINATED** as party defendants in this action.

Moreover, although defendants Steeken, Bevington, Salman, Turner, Gates, Balsinger, J. Fox, Zboril, Filpot, Daniel, M. Fox, Jolivette, Furmon, Dwyer, Jones, and Piper have not sought dismissal of the complaint, it is manifest that Plaintiffs' Fifth Amendment takings claims, and the ancillary procedural and substantive due process claims, and the conspiracy claims must fail for the same reasons that they cannot [*p.-21-] succeed against defendants Anthony Valen, William Young, Stephen Powell, John Connaughton, Charles Keller, Christopher Keller, Michael Simmons, Ridge Wind Quail Hunts, LLC, and Steven A. Gray (*i.e.*, Plaintiffs' takings claims are not ripe for adjudica-

tion, *see Williamson County*, and Plaintiffs' conspiracy allegations lack specificity, *see Spadafore).*

Under these circumstances, "[a] District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of the moving defendants." *Silverton v. Department of the Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981); *see also Muhammad v. State of Louisiana*, 2000 WL 1511181, at *4, 6 (E.D. La. Oct. 6, 2000); *Lesher v. Lavrich*, 632 F.Supp. 77, 84 (N.D. Ohio 1984) (citing *Silverton*).

IT IS THEREFORE FURTHER RECOMMENDED THAT the complaint be **DISMISSED** for failure to state a claim upon which relief can be granted and that the action be **TERMINATED** in toto.

In sum, the undersigned **RECOMMENDS THAT**:

1. The Motion to Dismiss of Judges Anthony Valen, William Young, and Stephen Powell, and Attorney John B. Connaughton (doc. 14) be **GRANTED**;
2. The Motion to Dismiss of Defendants Keller, Keller, Simmons and Ridge Wind Quail Hunts, LLC (doc. 19) be **GRANTED**; [*p. -22-]
3. The Motion for Judgment on the Pleadings of Defendant Gray (doc. 25) be **GRANTED**;
4. Plaintiff's Fifth Amendment takings claims, and all ancillary claims thereto, be **DISMISSED *without prejudice***; and
5. All pending motions be **DENIED as MOOT**, and this matter **CLOSED**.

DATE: December 29, 2005

s/ Timothy S. Black
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Michael Hanning Loriz; *et al.*,	)	FILED
	)	MAY 4 2005
Plaintiffs,	)	
	)	
vs.	)	Case No.
	)	1:06-cv-306
John B. Connaughton, *et al.*,[4]	)	
	)	
Defendants.	)	

[4] The Hon. John B. Connaughton, individually; Charles Keller, individually; Christopher Keller, individually; Michael Simmons, individually; Ridge Wind Quail Hunts, Llc; Lee Steenken, individually and in her official capacity as Butler County (Ohio) Board of Zoning Appeals member and former President; Thomas Bevington, individually and in his official capacity as Butler County (Ohio) Board of Zoning Appeals member; Gary Salman, individually and in his official capacity as Butler County (Ohio) Board of Zoning Appeals member and current President; John Zboril, Individually; Walt Filpot, in his official capacity as Butler County (Ohio) Board of Zoning Appeals member; Alan Daniel, in his official capacity as Butler County (Ohio) Board of Zoning Appeals member; Michael A. Fox, in his official capacity as Butler County (Ohio) Commissioner; Gregory V. Jolivette, in his official capacity as Butler County (Ohio) Commissioner; Charles R. Furmon, in his official capacity as Butler County (Ohio) Commissioner; The Hon. Anthony Valen, individually and in his official capacity as 12th appellate district (Ohio) Court of Appeals Judge; The Hon. William W. Young, individually and in his official capacity as 12th appellate district (Ohio) Court of Appeals Judge; The Hon. Stephen W. Powell, individually and in his official capacity as 12th appellate district (Ohio) Court of Appeals Judge; Thomas Turner, individually and in his official capacity as Warrant Officer, Area I Court, Butler County, Ohio; Richard K. Jones, in his official capacity as Sheriff, Butler County, Ohio; Anthony E. Dwyer, in his official capacity as Chief Deputy, Butler County, Ohio; Robin Piper, individually and in his official capacity as Prosecuting Attorney, Butler County, Ohio; Roger Gates, individually and in his official capacity as As-

1. Plaintiffs are residents of Suffolk County, New York. Prior to June 16, 2003, plaintiffs were residents of Butler County, Ohio. The actions of others, including DEFENDANTS, HAVE FORCED PLAINTIFFS TO VACATE PLAINTIFF'S OHIO RESIDENCE AND RESIDENCY, AGAINST PLAINTIFFS' LAWFUL DESIRE AND RIGHT. Incidents described hereinafter, and the claims arising from them, occurred before AND after June 16, 2003, are ongoing, and constitute a continuous tort.

2. Defendants Connaughton, *et al.*, are residents of Ohio, with the possible exception of defendant Christopher Keller, whose state of residence is unknown at this time.

3. The jurisdiction of this court is invoked pursuant to Article III § 2 and pursuant to Title 18 U.S. Code § 241 and § 242, Title 28 U.S. Code § 1331 and § 1332, and Title 42 U.S. Code § 1983 for violations of 1st, 5th and 14th Amendments.

4. On March 31, 2004, plaintiffs filed a complaint against Connaughton *et al* in United States District Court, Eastern District of New York. The case was docketed in the Court of Hon. Sandra J. Feuerstein as case CV 04 1331. Defendant Steven A. Gray moved to dismiss the complaint for improper venue pursuant to Rule 12(b) (3) of the FRCP. Defendant Thomas Turner, Roger Gates, James M. Fox, William E. Balsinger, Lee Steenken, Thomas Bevington, and Gary Salman sought to transfer venue to the Southern District of

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sistant Prosecuting Attorney (Civil), Butler County, Ohio; William E. Balsinger, individually and in his official capacity as Chief Zoning Inspector of Butler County, Ohio; James M. Fox, individually and in his official capacity as Zoning Inspector of Butler County, Ohio; Steven A. Gray, individually and in his official capacity as Wildlife Division Chief, Ohio Department of Natural Resources.

Ohio pursuant to 28 U.S.C. § 1404(a) or § 1406(a). Defendants Hon. Anthony Valen, Hon. William Young, Hon. Stephen W. Powell, and John B. Connaughton moved to dismiss for lack of subject matter and personal jurisdiction pursuant to FRCP 12(b)(1) and 12(b)(2), respectively, and for failure to state a claim upon which relief can be granted pursuant to FRCP 12(b)(6). In her Opinion and Order dated March 17, 2005, and received by U.S. mail by plaintiffs March 21, 2005, Judge Feuerstein granted Defendant Gray's motion to dismiss for improper venue, and denied the remaining motions as moot. The instant complaint is an amended version of the original complaint.

5. In 1995, following a company transfer, plaintiffs purchased a 45 acre farm in Butler County, Ohio. Plaintiffs built a 5000+ square foot custom home, barn, and large shed. Subsequently, parents of plaintiff Michael Loriz purchased a 5 acre lot adjacent to plaintiff's property, and built their retirement home.

6. During early construction of the house in 1995, Defendants Charles Keller and Michael Simmons visited plaintiff Michael Loriz, and informed plaintiff that they had applied for a zoning variance in order to operate a commercial bird hunting operation on the property adjacent to plaintiffs, which was owned by Defendants Charles and Christopher Keller. Defendants desired plaintiffs to support this variance request.

7. Plaintiff Michael Loriz immediately called the then Butler County Zoning Administrator, Steve Soltis, who confirmed the variance application. Mr. Soltis indicated that he was of the opinion that the variance was not likely to be approved due to safety and neighborhood concerns. A call to Marilyn Combs, the realtor who had just sold the property to the plaintiffs, confirmed that

there was overwhelming neighborhood opposition to the shooting range (including an opposing petition with approximately 200 names), and did not think it would be approved in the existing neighborhood.

8. Defendants Charles Keller and Michael Simmons reappeared the following day, and plaintiff Michael Loriz relayed the information gleaned. Defendant Charles Keller flew into a rage, and Plaintiff Michael Loriz asked him to leave the property. Wishing to avoid a nasty neighborhood argument, Plaintiff Michael Loriz offered to refund Defendant Simmons his application fee if Simmons would withdraw the variance request and cease efforts to establish a shooting range adjacent to the plaintiffs' property. Defendant Simmons agreed, and the variance request was withdrawn after plaintiff Michael Loriz wrote the $300.00 check to Defendant Simmons on the spot.

9. Plaintiffs finished building the house, barn, and large shed. Plaintiffs continued to develop their farm in the manner they felt most appropriate for the soil and terrain. After consulting with the Ohio Division of Natural Resources, plaintiffs applied for and were accepted into the Ohio Stewardship Incentive Program, which provided limited cost sharing for reforestation and existing timber stand improvement. During the period 1998-2000, plaintiffs spent thousands of hours and tens of thousands of dollars reforesting, thinning, buying equipment, and incorporating. Plaintiffs transformed the 2000+ square foot basement beneath the 5000+ square foot house into a semi-professional woodworking shop. Plaintiffs' plan was to establish a high value ($2 million per acre) hardwood veneer tree farm, and put the property into trust for plaintiffs' descendants.

10. During this same period, plaintiffs also had much illegal firearm use on and into plaintiffs' property. Af-

ter several reports by Butler County Sheriff personnel, plaintiff Michael Loriz addressed defendants Fox and Furman at a County Commission meeting. The only assistance these defendants could offer was for plaintiffs to file a civil complaint against the shooters.

11. In January 2001, hell broke loose next to plaintiffs' house. Weekends brought dozens of shotgun-shooting gentlemen to the fields adjacent to plaintiffs' house, farm, and, in at least one case, on plaintiff's backyard. Plaintiff Cara Loriz discovered internet advertising for the shooting range operations, and plaintiffs discovered that the State of Ohio Division of Wildlife had approved various applications from defendants Charles Keller and Michael Simmons. When defendant Gray's representative, Butler County game warden Mike Custer, was asked by plaintiffs how the State could approve such a level of firearms use 300 feet from a residence, he sheepishly replied that they had not known that our house was there. The Butler County Zoning Department subsequently issued a notice of zoning violation to defendant Charles Keller and an order to discontinue, cease, and desist this violation. Defendant Keller refused to do so.

12. In March 2001, the Butler County Zoning Department requested that Judge Keith Spaeth issue a temporary restraining order against the shooting range. In the lobby outside the courtroom, plaintiffs' first attorney, when he saw that defendant John Connaughton (who is also an Area Court Judge in Butler County) would be opposing counsel, put his head in his hands and said "Oh, no". This response was prescient, as Judge Spaeth decided (immediately following a discussion in chambers to which plaintiffs were not invited) that the rights of dozens of shooters, many from out of state, to shoot into plaintiffs' backyard took precedence over plaintiff's right to safely live in their house. Dur-

ing this event, as well as during prior events, plaintiffs generally evacuated their house during the shooting operations due to projectile hazard and extremely high noise levels.

13. Prior to the start of the March event, knowing that it was not in compliance with the applicable zoning resolution, plaintiff Michael Loriz videotaped the shooters as they entered the driveway. This was done with the knowledge and approval of plaintiffs' attorney, and was done from public property. At least one of the shooters was not happy about being videotaped, as one of them went to plaintiffs' fence and shot three times toward plaintiffs' house, in an extremely threatening manner, shortly after the videotaping was finished.

14. In March 2001, plaintiffs filed a civil complaint in the Ohio Common Pleas Court against several defendants for nuisance and loss of quiet enjoyment. In the intervening period, however, the damage done to plaintiffs' by defendants Charles and Christopher Keller and Michael Simmons have risen to the level of a 5th Amendment taking. These defendants, and or their clients, have repeatedly shot at plaintiff Michael Loriz, have routinely shot into plaintiffs' property, and have forced plaintiffs to vacate their property. Depositions indicate that defendant Charles Keller threatened neighbors in an attempt to coerce them into supporting the shooting range. Defendants Charles and Christopher Keller built very large deer shooting stands (multi-story, approximately 25 feet tall) approximately 150 feet from plaintiffs' fence and set up a deer feeder approximately 75 feet from plaintiffs' property, approximately 300 feet from plaintiffs' house. Shots taken from the deer stand are taken toward the deer feeder, with plaintiffs' house behind the deer feeder. The ballistic range of the shotgun slugs used for deer hunting is 1200 to 3000 feet, and the ricochet range of

that same ammunition is approximately 800 feet, putting anyone outside plaintiffs' house in serious and grave danger. While in or near the deer stand, defendant Charles Keller, evidently unhappy that plaintiff Michael Loriz was cutting invasive growth on plaintiff's own property, shot over plaintiff's head while plaintiff was on his own property. These defendants' actions appear to have been malicious, reckless, wanton, and in complete disregard for plaintiffs' rights to use their own property in any manner, including those specifically permitted by zoning resolution. These defendants, allied with the government defendants, have effectively, wrongfully, and unlawfully taken plaintiffs property, in direct violation of the 5th Amendment.

15. In April 2001, the Butler County Board of Zoning Appeals ('BZA'), including Defendants Lee Steenken, Thomas Bevington, John Zboril, Alan Daniel, and Gary Salman, unanimously found defendants Charles Keller and Michael Simmons to be in violation of the zoning resolution. (The BZA defendants were appointed by and or represent the Butler County Commissioner Defendants Michael A. Fox, Gregory V. Jolivette, and Charles R. Furmon).

16. On July 17, 2001, and February 19, 2003, the BZA approved a conditional use permit to allow a commercial shooting range to be opened adjacent to plaintiffs' residence and tree farm in Butler County, Ohio. These Defendants approved the range despite the fact that a conditional use was not allowed by the zoning resolution for this operation; and despite testimony from a neighbor that on at least one prior shooting event there were large numbers of hunters trespassing onto plaintiffs property, that plaintiffs' property was rendered worthless by expert testimony, or that the range was completely out of compliance with NRA standard for safe operation. The range operators were repre-

sented before the BZA by Defendant Hon. John B. Connaughton. Mr. Connaughton's appearances, testimony, and conduct before the BZA were prohibited by the Ohio Code of Judicial Conduct, Ohio Revised Code, and the Ohio Code of Professional Responsibility.

17. Judge Connaughton attempted to void, with some success, the petitions to the BZA signed by more than 50 area residents, including plaintiffs, opposed to the approval of the range. Defendant Connaughton repeatedly perjured himself before the BZA, and made false statements to the Common Pleas and the Appellate courts. The only substantial testimony presented on behalf of the shooting range has been the testimony of Mr. Connaughton, which he later stated was the functional equivalent of sworn testimony.

18. On at least one occasion, Defendant Connaughton stood at plaintiffs' fence while same defendant's clients shot into plaintiffs' property. This intentional act, which was videotaped, was in violation of Ohio law. Following this act, defendant Connaughton suborned the testimony of one of the act's participants in order to attempt to rehabilitate himself. Mr. Connaughton also appears to have established a pattern of corruption with Defendant Prosecutor Gates in order to protect himself and his clients from criminal prosecution relating to this act.

19. Defendant Connaughton's illegal and or improper conduct has been inconsistent with his own oath of office (which, in part, specifies that he shall support the constitution of the U.S.); has been prohibited by the Code of Judicial Conduct (which also applies to acts taken outside judicial capacity);has been inconsistent with the attorney's Code of Professional Responsibility; was prohibited by Ohio Revised Code; appears to constitute a pattern of corruption; has been wanton and

reckless, and has resulted in deprivation of plaintiffs' 1st and 5th Amendment rights. Judicial immunity is not applicable to defendant Connaughton as he was not acting in a judicial capacity in any of these activities.

20. The BZA was given manufacturer's ballistic data indicating that the shot being used at the shooting range has a maximum ballistic range of approximately 900 feet. The BZA was also informed that the National Rifle Association ('NRA') establishes that a 900-1200 foot setback should be observed from all adjacent lot lines to ensure projectile containment within a given shotgun shooting range using this kind of ammunition.

21. The BZA devalued the petitions of over 50 neighborhood residents, including the plaintiffs, at the request of Defendant Connaughton, in violation of plaintiffs' 1st Amendment rights.

22. The BZA ordered a setback of only 100 to 300 feet to this range (using the erroneously cited code standard for a baseball field), resulting in a rain of lead onto plaintiffs' farm and a continuous violation of Ohio law. The lead has destroyed the value of plaintiffs' hardwood trees, contaminated plaintiffs' property with hazardous waste (lead), and forced permanent vacation of property by plaintiffs and family in order to avoid death or grievous physical injury from high-speed projectiles emanating from the shooting range and trespassing onto plaintiffs' property.

23. On one of the few occasions that plaintiffs walked in their backyard during the operation of the shooting range, plaintiff Michael Loriz watched two shooters track a rising bird, and one of the shooters fired three rounds at the bird, which was between the shooter and plaintiff. The shot hit the trees over plaintiff's head, on plaintiff's property. Attempts to prosecute the individuals were unsuccessful. This event, coupled with

the inability and or unwillingness of the Butler County Sheriff department (represented by defendants Sheriff Jones, his predecessor, or Chief Deputy Dywer) or the Butler County Prosecutor's office (represented by defendants Piper, Gates, or Turner) to stop people from shooting firearms at plaintiffs, made it clear to plaintiffs that the routine use of their property was unsafe.

24. Plaintiff Michael Loriz made repeated attempts before the BZA at subsequent hearings to split the portion of the property which had not been damaged from the contaminated portion in order to salvage some value from the mess. The BZA repeatedly refused to grant these requests, even after the BZA put onerous restrictions on the plaintiff, such as building a 24 foot wide paved driveway to access a 17 foot wide county road. At one point the BZA even suggested that plaintiff leave a buffer at the back of plaintiffs' property in consideration of the shooting range, in itself suggestive of an illegal taking. In repeated acts of bad faith, defendant Balsinger encouraged plaintiff Michael Loriz to reapply for the split, at considerable cost and aggravation to plaintiff, with false assurances that the split would be approved. All other attempts to sell or salvage any value from the property have been completely unsuccessful, other than a recent offer of $100,000 from Defendant Connaughton for our property which had been appraised at $700,000 prior to the shooting range, not counting timber and reforestation value. A copy of this letter is attached. Plaintiffs suggest that this letter is clear evidence of the conspiracy among the various defendants to confiscate our property, in violation of plaintiffs' 5th and 14th amendment rights.

25. The actions of Defendants Steenken, Bevington, Daniel, Filpot, Zboril, and Salman have resulted in a taking of plaintiffs' property, without just compensation or due process, in violation of plaintiffs' 5th and 14th

amendment rights. Their actions appear to have been malicious, reckless, wanton, in bad faith, and in complete disregard for plaintiffs' rights to use their own property in any manner, including those specifically permitted by zoning resolution. Any limited immunity which attaches to these defendants has been stripped by the corrupt, reckless, and wanton manner in which they have acted. Plaintiffs note that BZA defendant Alan Daniel voted against the shooting range, was absent or otherwise did not vote; and defendant Walt Filpot was not yet on the BZA during any of the votes. However, these two BZA defendants are named in order to fully enjoin the BZA as a political subdivision. BZA defendant Zboril is no longer on the board; however, he was present and voted in favor of the range in July 2001.

26. At the July 2001 hearing during which the BZA conditionally approved the shooting range, one of the stipulations was that an annual hearing would occur before the BZA during which neighbors could voice concerns about the range and the BZA could add or remove restrictions as the monitoring of the operation (by the zoning staff and the BZA) warranted. The first such hearing did not occur until April 2004. As discussed in paragraph 53, at least one resident was not allowed to even speak at the hearing, and the BZA was utterly negligent in exercising any duty of care, much less the special duty of care suggested by their own stipulation of the annual review. Such negligence also strips the BZA defendants of their limited immunity.

27. Judge William Stapleton was assigned the case of the appeal of the BZA's decision as a visiting Judge in the Butler County Court of Common Pleas. At the time he was assigned to the case, Judge Stapleton was terminally ill with cancer.

28. At around this time, the original civil nuisance suit was joined with the appeal of the BZA's decision, without the plaintiffs' prior knowledge or opportunity to object. Also, defendants Michael Simmons and Charles Keller formed 'Ridge Wind Quail Hunts, LLC'.

29. Judge Stapleton found the BZA decision to be fatally flawed, but remanded the case back to the BZA in direct violation of Ohio law.

30. Documents filed by Judge Stapleton with the Supreme Court of Ohio indicate that during the time he was purportedly reviewing hundreds of pages of transcripts and evidence from the remand hearing in accordance with his lawful duties -- considering the facts of the case and writing his decision -- he billed zero time to the case. In addition, according to Butler County Court Clerk records, during this time those same files were checked out to another Judge in Butler County, thereby depriving both Judge Stapleton and plaintiffs the opportunity to study the case files.

31. Judge Stapleton also failed to report defendant Connaughton's improper appearance before the BZA to proper authority, as he is required to do by Judicial Canon.

32. Judge Stapleton's conduct has been inconsistent with his oath of office, has the appearance of being grossly negligent, and has resulted in deprivation of plaintiffs' 5th and 14th Amendment rights. Plaintiffs' attorney indicated that the Ohio Supreme Court was concerned about some of Judge Stapleton's decisions during this period of his failing health. However, plaintiffs have chosen not to file a claim against the estate of Judge Stapleton, as it would not be proper to burden his heirs with the results of his improper conduct a few months prior to his death.

33. On October 7th, 2003, the 12th Appellate District of the Court of Appeals of Ohio conducted a hearing regarding the case, with defendants Valen, Young, and Powell presiding.

34. Defendants Valen, Young, and Powell, as well as defendants Connaughton and Gates, share the upper echelons of the Butler County Republican Party membership hierarchy; and the judge's names, titles, and party affiliation levels are advertised on the worldwide web. Defendant Powell is a member of the Chairman's Club, and defendants Valen, Young, and Connaughton are Gold Elephants. Plaintiffs certainly acknowledge the rights of defendants to partake in the political process, including party membership (until two years ago, plaintiff Michael Loriz had been a lifelong Republican). However, circumstances force plaintiffs to assert that the hearing was effectively a political, rather than a judicial, proceeding. Plaintiffs assert that these affiliations and others to be discovered will demonstrate the various defendants' complicity in conspiring to unjustly protect and promote defendant Connaughton and his clients, thereby abridging and denying plaintiffs' Constitutional rights.

35. In response to a direct question from the Court to defendant Connaughton regarding the range of the projectiles emanating from the shotguns being used on the shooting range, Connaughton responded that the projectiles traveled 1100 feet. The Court was aware that by BZA order the shooting range operations are set back only 300 feet from plaintiffs' property, and the Court understood that defendant Connaughton was acknowledging that the shots were carrying as far as 800 feet into plaintiffs' property, in direct violation of Ohio firearm discharge law as well as plaintiff's 5th and 14th Amendment rights.

36. The 12th Appellate (Ohio) Court was informed of the lack of time billing to the Ohio Supreme Court by Judge Stapleton, documented by Ohio Supreme Court filings made by Judge Stapleton, by plaintiff's attorney. They failed to address this in their ruling or report it to the Disciplinary Counsel.

37. The 12th Appellate (Ohio) Court also failed to note and report the impropriety of Judge Connaughton's appearance and testimony before the BZA to proper authority, in violation of Ohio Judicial Canon. The Court further used Mr.Connaughton's prohibited testimony to support their affirmation of Judge Stapleton's ruling.

38. These failures, coupled with political relationships with defendants Connaughton and Gates outside these proceedings, suggest possible corruption on the part of the Appellate Court.

39. The 12th Appellate (Ohio) Court upheld false statements by defendants Gates and Connaughton regarding limitations on plaintiff Michael Loriz's testimony at the original BZA hearing. Plaintiff Michael Loriz was limited, as were all those in opposition to the shooting range, to five minutes to present evidence compared to several hours of testimony by Mr. Connaughton and his clients. The appellate court's upholding of false statements relating to Plaintiff's 1st and 14th Amendment rights in direct contradiction to the record is itself a violation of plaintiff's rights of government petition and due process.

40. On October 9, 2003, Judge Stapleton died.

41. The 12th Appellate (Ohio) Court's decision on December 8, 2003, upholding the range is inconsistent with their oath of office; appears to be wanton, reckless, and corrupt; and has resulted in the unlawful and

wrongful deprivation of plaintiffs' 1st, 5th and 14th Amendment rights. Furthermore, the Ohio legislature has reasonably indicated that it is unlawful to discharge a firearm into the property of another. By ruling that in this case, it IS lawful for the defendants to fire copious amounts of 12 gauge shotgun fire into plaintiffs' property, these defendants have effectively usurped the legislative role of the Ohio legislature. In essence, the function of the 12th Appellate Court in this case was legislative, not judicial, and as such, the conduct is not protected by judicial immunity.

42. By approving and upholding a commercial shooting range which was acknowledged by defendant Connaughton in their Court to be shooting lead up to 800 feet into plaintiffs' property, IN DIRECT VIOLATION of Ohio Revised Code pertaining to firearm discharge, defendants Stapleton, Valen, Young, and Powell have acted outside their judicial capacity, and have wrongfully and unlawfully deprived plaintiffs of their 1st, 5th, and 14th Amendment rights.

43. On December 10, 2001, defendant Thomas Turner, Butler County Warrant Officer, caused plaintiff Michael Loriz to be served with a summons of a complaint alleged by one of the shooting range's patrons, Kenneth Botzung. The Court dismissed the charge when it became aware that plaintiff Michael Loriz was in Costa Rica during the time of the alleged offense.

44. On May 28, 2002, in a case of malicious prosecution, defendant Turner again caused plaintiff Michael Loriz to be served with essentially the same summons, in direct violation of plaintiff's 5th Amendment protection against double jeopardy. This charge was dismissed in court after hearing only the accuser's insufficient evidence, but at great cost and distress to plaintiffs. The underlying incident is sworn to in an attached affidavit

by Joyce Franchini, a neighbor who witnessed the event. As described in the affidavit, plaintiff Michael Loriz was attempting to photograph a patron of the range who was outside the prescribed limits of the range. In an obvious act of intimidation, the range patron, at the apparent direction of defendant Charles Keller, was carrying a rifle past plaintiff Cara Loriz, who was gardening, and plaintiffs' then six-year-old daughter, who was playing on her swing set.

45. During this same time period, defendant Turner adamantly refused plaintiff Michael Loriz's requests to file charges against specific patrons of the shooting range for illegal firearm discharge or other violations, even with sworn testimony, videotape and photographic records, and prima facie evidence of damage and trespass. Defendant Turner's malfeasance and wanton conduct in assisting Botzung's obviously malicious prosecution attempt, and repeated refusal to allow plaintiffs to pursue criminal charges against people shooting at plaintiffs or into plaintiffs' property, is in violation of plaintiff's 14th Amendment guarantee of equal protection, and is not protected by his limited immunity.

46. The Butler County Zoning Inspectors, Defendants William Balsinger and James Fox, have recklessly and wantonly failed to enforce the Butler County Zoning Resolution from April 2001 through the present relating to, among many issues, lack of required Health department approval, stay of the shooting range operation during appeal, prohibition of commercial recreation in the A-1 zone, and fines for violations by Defendant Connaughton's clients. This selective enforcement in favor of a county judge's clients is a wrongful violation of plaintiffs' 14th Amendment guarantees of equal protection.

47. Defendant Roger Gates, Butler County Assistant Prosecutor (Civil) has been representing the BZA,

aligned with defendant Connaughton. (Defendant Gates is also an 'Early Bird' in the Butler County Republican party hierarchy). Plaintiff has been informed by Sheriff's department personnel and a junior prosecuting attorney that Defendant Gates actively inhibited and shut down a criminal investigation by the Butler County Sheriff's office of an incident involving defendant Connaughton and his client shooting into plaintiffs' property, reported to the Butler County Sheriff by plaintiff Michael Loriz. This information was confirmed by defendant Chief Deputy (Major) Anthony Dwyer (phone log attached). Such wanton obstruction of justice wrongfully abridges plaintiff's 14th Amendment guarantee of equal protection, and implies collusion, complicity, and or conspiracy with defendant Connaughton. Such activity is also outside his official capacity as a civil prosecutor.

48. Defendant Dwyer and Defendant Piper were aware that Detective Schultheiss was contacted by Civil Prosecutor Gates and another prosecutor in order to shut down the firearm discharge violation by Judge Connaughton and his client, yet failed to correct or otherwise seriously investigate the obviously improper and probably illegal interference by defendant Gates. Such failure constitutes a violation of plaintiffs'14th Amendment guarantee of equal protection, and implies collusion, complicity, and or conspiracy with defendant Connaughton.

49. From early 2001 through the present, defendant Steven A. Gray, chief of the Wildlife Division of the Ohio Department of Natural Resources, and his predecessor, issued numerous permits to defendant Connaughton's clients. These permits have been given with no provision for public comment or any regard for public safety, and are in accordance with neither State Law nor the chief's own regulations for safe operation. The first indications plaintiff had that the permits had been

granted was the presence of over 35 armed men shooting 12 gauge shotguns 300 feet from plaintiff's house, with the resulting rain of hundreds of rounds of shotgun fire and forced vacation of plaintiff's residence by plaintiffs to avoid risk of death or grievous physical injury from projectiles escaping the boundaries of the range. Defendant Gray's representative, Butler County game warden Mike Custer, admitted that the initial permits were granted with lack of knowledge of the proximity of plaintiffs' residence to the shooting operations. The failure by defendant Gray and the Division of Wildlife to conduct even the most cursory inspection prior to permitting dozens of visiting shooters to shoot thousands of rounds of twelve gauge shotgun fire as close as 300 feet from plaintiffs' house, with no regard to direction of shot, is reckless in the extreme. The reissuing of such permits under the now known circumstances is wanton.

50. The operation of the subject shooting range results in continuous violation of Ohio law.

51. Plaintiffs have repeatedly contacted defendant Gray and or members of his staff to inform him of the shot trespass and lack of noise suppression that have been associated with the activities on the Keller property which defendant Gray has permitted. Defendant Gray has wrongly failed to meaningfully investigate the range, correct any of the problems, or in any way require the range to come into compliance with his own departments' regulations or State law.

52. Defendant Gray's wrongful granting of these permits and licenses is a violation of plaintiffs' 14th Amendment due process rights, and has effectively resulted in unlawful taking of plaintiff's farm and residence in both a substantive and procedural sense, in violation of plaintiffs' 5th Amendment rights.

53. In April 2004 plaintiffs spent two days and considerable expense traveling to Butler County for the annual review hearing for the shooting range by the BZA. Prior to speaking to the board, plaintiff Michael Loriz was ordered out of the building by defendant Bevington, in violation of plaintiffs' statutory and constitutional rights, as well as Ohio civil rights law. Plaintiff was escorted from the premises by an armed deputy. Plaintiff complied with the request, although defendant Bevington was entirely without provocation or authority to issue that order. The incident report is attached. Defendant Prosecutor Piper was made aware that plaintiff Michael Loriz was ordered to leave the public hearing place prior to speaking, in gross violation of his 1st Amendment rights of free speech and petition, and refused to investigate the matter, in wrongful violation of plaintiff's 14th Amendment guarantee of equal protection. Such capricious and arbitrary conduct has stripped Prosecutor Piper of his immunity.

54. The last tree milled by plaintiff Michael Loriz from plaintiffs' property was a large walnut tree removed in a timber stand improvement approximately 250 feet behind plaintiffs' residence, approximately 75 feet from defendant Kellers' property, close to areas of heavy shooting since January 2001. After rough milling, stacking and drying the boards in sequence, final milling began (as the house and property were being frantically prepared for abandonment). The first board through the planer had lead shot in it, and the pile of walnut lumber turned into firewood. The matched, air-dried walnut from that tree, worth approximately $5000 retail, and representing over $100,000 in hand made wood strip kayaks which plaintiff Loriz makes, was ruined. The ten acres of tree seedlings have been almost completely lost.

55. Plaintiff Cara Loriz took a soil sample from the streambed behind the residence to her Miami university geology class, for her students to analyze. The sample included at least one lead pellet.

56. Parents of plaintiff Michael Loriz, whose house was not adjacent to the shooting range, sold their house and property at a substantial loss and relocated near their daughter in Oregon. Plaintiffs' children now see their grandparents a few times per year, instead of on a nearly daily basis as in the past.

57. More than four years after filing the State complaint referred to in paragraph 14, the action is not even through discovery. The improper influence of the various defendants, especially defendant Connaughton, has slowed the judicial process to less than a crawl. Such improper manipulation of the court system is also in violation of plaintiffs' 14th Amendment rights.

58. The results of the illegal and or improper actions of the various defendants include: Forced relocation of plaintiff and family to 900 square foot retirement house 800 miles distant; value of Ohio property decline from $700,000 to zero, according to appraiser, due to projectile threat and lead contamination; loss of over $150,000 in legal fees and expenses; loss of friends, pets, plaintiff Cara Loriz's job (including income and benefits), plaintiff's salvage logging business, future value of ten acres of hardwood veneer plantation; inability of plaintiff to adopt disadvantaged children, as had been planned; profound emotional distress requiring professional counseling for plaintiff, public humiliation from being forcibly removed from a public meeting without cause, and the imminent prospect of bankruptcy for plaintiff. The defendants have conspired to take plaintiffs' property and otherwise deprive plaintiffs of 1st, 5th, and 14th Amendment rights.

59. WHEREFORE, plaintiff demands:

Declaratory judgment establishing that the BZA approval of the subject shooting range and Judge Stapleton's ruling in support of the BZA were unlawful and unconstitutional. Permanent injunction against the BZA from permitting shooting range operations as conditional uses in the A-1 zone.

Permanent injunction against defendant Gray from permitting any shotgun shooting operations, public or private, including the subject shooting range, that are not in compliance with the National Rifle Association ballistic guidelines for setback from all lot lines, which provide basic protection against unconstitutional taking.

A diligent and thorough investigation by the United States Attorney into corrupt practices within the Butler County Sheriff, Prosecutor, Judicial, and Executive departments.

Defendants pay plaintiffs fair market value (prior to shooting range) for residence and property, and assume all liability for lead contamination of plaintiff's property.

Money damages (incidental and punitive) in the amount of $10,000,000.

Any further relief which the Court may deem appropriate.

Respectfully submitted,

s\Michael Hanning Loriz
s\Cara Francke Loriz
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11964-0923
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Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(1)

No. 06-711

FILED
DEC 2 [illegible]

In the Supreme Court of the United States

MICHAEL HANNING LORIZ,
CARA FRANCKE LORIZ,
Petitioners,

v.

JOHN B. CONNAUGHTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Respondents believe that this case really presents only one question which they state as follows: Whether the Court of Appeals correctly denied petitioners' request for an injunction pending appeal of the District Court's dismissal of all of petitioners' claims due to a lack of jurisdiction under the *Rooker-Feldman* doctrine, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (lack of ripeness), and other grounds, stemming from a decision by the Butler County Board of Zoning Appeals which granted a conditional use permit for commercial recreational use of an adjacent property.

PARTIES TO THE PROCEEDING UNDER RULE 14.1(b)

Respondents are the Honorable Judge Anthony Valen, The Honorable Judge William Young, The Honorable Judge Stephen W. Powell, John B. Connaughton, Charles Keller, Christopher Keller, Michael Simmons, Ridge Wind Quail Hunts, LLC, Lee Steenken, Thomas Bevington, Gary Salmon, Alan Daniel, Walt Filpot, Thomas Turner, Roger Gates, William E. Balsinger, James M. Fox, John Zboril, Michael A. Fox, Gregory V. Jolivette, Charles E. Furmon, Anthony E. Dwyer, Richard K. Jones, Robin Piper and Steven A. Gray (Chief of the Ohio Department of Natural Resources Division of Wildlife).

Petitioners are Michael Hanning Loriz and Cara Francke Loriz.

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2) Order of the Sixth Circuit Court denying motion for injunction pending appeal, Case No. 06-3429, entered August 18, 2006;

3) Order of U.S. District Court, Southern District of Ohio adopting Report and Recommendations in Case No. 1:05-cv-00306-SSB-TSB, entered February 24, 2006;

4) Report and Recommendations of Magistrate Black, U.S. District Court, Southern District of Ohio, Case No. 1:05-cv-00306-SSB-TSB, entered December 29, 2005;

The above Opinions and Orders are those of the federal courts immediately below.[1]

The following are underlying Opinions and Order of state courts and agencies which have preceded the plaintiffs' complaint in federal court:[2]

1) Decision of the Butler County Common Pleas Court, Butler County, Ohio granting motion for summary judgment of the Butler County Officials, Loriz, et al vs.

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[1] These Opinions and Orders are all set forth in the *Petition Appendix*.

[2] These appear in as Appendices No. 9, 8, 7, 5 and 3, respectively.

Keller, et al, Case No. CV01-04-0714, entered December 6, 2005;

2) Opinion of the Twelfth District Court of Appeals, Butler County, Ohio, In Re: Application of Charles E. Keller, 2003-Ohio-6549, Appellate No. CA2003-04-100, dated December 8, 2003;

3) Final Appealable Order of the Butler County Common Pleas Court, Butler County, Ohio, Loriz, et al vs. Keller, et al, Case No. CV01-04-0714, entered April 11, 2003;

4) Order for Case Consolidation of the Butler County Common Pleas Court, Butler County, Ohio, Loriz, et al vs. Keller, et al, Case No. CV01-04-0714, entered December 11, 2001;

5) Decision of the Butler County Board of Zoning Appeals, In Re: Application of Keller, Case No. BZA01-26C, issued July 26, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by the petitioners, respondents rely upon 28 U.S.C. § 1257 and Ohio Revised Code Sections 2506.04, 163.05, 163.09, 163.17, 163.54, 163.55 and 163.61.[3]

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[3] These statutory provisions are provided in Appendix No.12.

STATEMENT OF THE CASE

The petition before the court arises from a long running, bitter and litigious dispute between two adjacent private landowners in Butler County, Ohio, the Lorizes who lived and the Kellers who run a business on their property with ~~Michael~~ Simons as Ridge Wind Quail Hunts, LLC. In 2001, Mr. Keller was cited for zoning ordinance violation in *In Re: BZA01-17V*, see Appendix No. 1, which case came on for hearing before the Butler County Board of Zoning Appeals on April 17, 2001. Prior to the Board of Zoning Appeal violation hearing, petitioners sued the Kellers, Ridge Wind, the National Shoot to Retrieve Association and the Chief of the Division of Wildlife, Department of Natural Resources of the State of Ohio in the Butler County Court of Common Pleas Case No. CV01-04-0714. See Complaint, Appendix No. 2, pp. 3a - 14a. The Board of Zoning Appeals upheld the violation notice.

In May of 2001, the Kellers applied for a conditional use permit for a commercial recreational use and a hearing was set for July 17, 2001. The petitioners were provided notice of the hearing as required by law and appeared with counsel at the hearing. The Lorizes presented testimony and evidence at the initial hearing. On July 26, 2001, the Board of Zoning Appeals issued its decision granting the conditional use permit with seventeen conditions. See Appendix No. 3, pp. 15a - 17a. This permit for a commercial recreational use permitted Ridge Wind to operate field trials for its patrons, sportsmen wishing to train and exhibit their hunting dogs' abilities.

Subsequent to the grant of the permit to the Kellers with conditions, the Lorizes appealed this decision to the Butler County Court of Common Pleas, Case No. CV01-08-1777, challenging the decision of the Board of Zoning Appeals. See

Appendix No. 4, pp. 18a - 19a. The Lorizes lost their challenge.[4] One of the original conditions on the permit was that the Kellers had to come back for annual review. During the review process, some of the other conditions were modified. Certain of these modifications are subject to an appeal by the Lorizes in Butler County Court of Common Pleas Case No. CV05-07-2228. See Appendix No. 10, pp. 51a - 52a.

Unhappy with their results in State Court, the Lorizes turned to Federal Court. Initially, they filed suit against the defendants in the Eastern District of New York, Case No. 04-CV-01331-(SJF)-(ARL). After that case was dismissed for improper venue, the Lorizes re-filed their action in the Southern District of Ohio, Western Division. The United States District Court for the Southern District of Ohio dismissed all of the petitioners' claims, including those for

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[4] On December 11, 2001, an Order to consolidate the Lorizes civil suit against the Kellers, Case No. CV01-04-0714, with the appeal of the Board of Zoning Appeals decision, Case No. CV01-08-1777, was issued consolidating the zoning appeal into the civil case. See Appendix No. 5, pp. 20a - 21a. On February 20, 2002, plaintiffs moved for leave to file an amended complaint which motion was granted. The amended complaint added the Butler County Board of Zoning Appeals members and the County Commission. See Appendix No. 6, pp.22a - 23a. The Final Appealable Order on the Zoning Appeal was entered on April 17, 2003 affirming the decision of the Board of Zoning Appeals. See Appendix No. 7, pp. 36a - 38a. Petitioners then appealed to the Twelfth District Court of Appeals. The Court of Appeals affirmed the decision. *See In Re: Application of Charles E. Keller*, 2003-Ohio-6549 (Dec. 8, 2003). Appendix No. 8, pp. 39a - 45a. However, it was not until December 6, 2005 that the Court of Common Pleas granted summary judgment to the county officials dismissing them from the consolidated lawsuit. See Appendix No. 9, pp. 46a - 50a.

injunctive relief. The Lorizes appealed and requested a preliminary injunction pending appeal. Specifically, with respect to the Butler County officials, the Lorizes requested the Court enjoin the permitting and licensing of the Kellers' shooting, dog training and field trial activities, and issue an injunction against the County conditional use permit.[5]

SUMMARY OF THE ARGUMENT

The District Court correctly did not rule on petitioners' request for an injunction. Likewise, the Sixth Circuit Court of Appeals correctly denied plaintiffs' request for an injunction. The lower courts' decisions were supported by several federal court doctrines which operate to bar petitioners' requests for relief. Most notably, this Court's *Rooker-Feldman* doctrine barred the lower courts from ruling on petitioners' claims for lack of subject matter jurisdiction. *Rooker-Feldman* arises from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) which stand for the proposition that state courts' decisions be given full force and effect and that only the United States Supreme Court has jurisdiction to review state court decisions.

Significantly, subject matter jurisdiction also is lacking even in this Court as well as the lower federal courts due to a lack of ripeness under this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of*

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[5] See Motion for Preliminary Injunction Pending Appeal filed in the United States Court of Appeals for The Sixth Circuit, Case No. 06-3427, Page 2, attached as Appendix No. 11, p. 55a (only the portion of the Motion and Memorandum Requesting Relief were reproduced).

Johnson City, 473 U.S. 172 (1985). Petitioners' claims are not ripe under *Williamson County* since they fail to request compensation using state court procedures and fail to satisfy *Williamson County's* finality requirement that they exhaust the possibilities of obtaining relief from the Butler County Board of Zoning Appeals - the agency issuing the Order which they now seek to overturn by injunction.

In addition to these jurisdictional bars to petitioners' claims for relief, several doctrines warrant federal court abstention from interference with state court decisions. First, *Colorado River* abstention warrants federal courts to leave this matter in the hands of state court where it was first filed and is presently pending. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976). Not only was the Butler County Court of Common Pleas the first court to entertain plaintiffs' complaints, Butler County is the location of the majority of the witnesses, the evidence, the underlying county agency and is best suited to rule on petitioners' essentially state law nuisance claims. *Id.* Second, *Pullman* abstention likewise warrants showing comity toward the decisions and regulatory scheme set out by state government. *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). Petitioners' state law nuisance claims which predominate the current case should be determined in state court which would obviate the need for any federal proceedings. Last but not least, *Burford* abstention limits federal court equitable jurisdiction which otherwise would interfere with the orders of state administrative agencies particularly where difficult questions of state law or the exercise of federal review would be disruptive to states' efforts to establish a coherent policy in matters of substantial public concern. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Even the substantive law implicated by petitioners' claims warrants a denial of their petition. This Court has long held that injunctive relief is not available from a taking claim where the aggrieved party can bring a suit for compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Ohio has compensation statutes for eminent domain proceedings. R.C. 163.01, et seq. Furthermore, the Sixth Circuit Court of Appeals has held that even where a suit for eminent domain was not instigated by the government, mandamus provides an appropriate procedure to an aggrieved landowner to obtain compensation in Ohio. *Coles v. Granville*, 448 F.3d 853, 862 (6th Cir. 2006).

Petitioners' claims do not fit within any of the categories this Court has established for per se rules to qualify for an injunction. Only facial challenges or instances where a petitioner's right to protect his property has been criminalized has this Court recognized the right to injunctive relief. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Duke Power Company v. Carolina Study Group, Inc.*, 438 U.S. 59 (1978). Cases in other areas of law such as criminal action related to seizure or due process violations do not constitute grounds for injunctive relief because petitioners' complaint sounds in the Fifth Amendment. Compare *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) to *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) and *Greene v. Lindsey*, 456 U.S. 444 (1982). Petitioners can cite to no specific examples, and respondents can find none where a zoning decision on an adjacent owner resulted in a taking upon a complainant. This is not a case of physical occupation, as argued by the petitioners, when this case is compared to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This case is also not one involving the state holding petitioners' use a nuisance as in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). This case

is closer to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Instead of the regulation directly regulating petitioners' property, the regulation regulated the property of the Kellers, co-defendants in this litigation, which regulation had no more than an incidental effect on the property of the plaintiffs.

Petitioners have utterly failed to show that the property regulation of the Kellers' property was anything other than that contemplated by *Village of Euclid v. Ambler Realty Co.*, 72 U.S. 365 (1926). As this Court originally stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and more recently *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (unanimous decision), government has the right to affect property values through regulation without paying for it so long as it does not go too far. Petitioners are not entitled to injunctive relief. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (citations omitted).

As indicated above, one of the central issues fatal to petitioners' claim is that their federal claims are premature. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Additionally, petitioners failed to show that the issuance of injunction pending appeal would subject them to irreparable injury. Quite the contrary, injunction pending appeal would likely subject the Kellers to irreparable injury, potentially cause substantial harm to others and not be in the public interest. In addition, the petitioners do not have a strong likelihood of success on the merits regarding their federal claims. The merits of petitioners' state court nuisance claims, which are currently being litigated, should not weigh into whether petitioners have met all of the requirements to be in

federal court and or whether they will succeed with their claims against the Butler County officers in federal court.

REASONS FOR DENYING THE WRIT

I. The Court Lacks Jurisdiction Over the Petitioners' Claims

A. The Court Lacks Jurisdiction Under the *Rooker-Feldman* Doctrine

In the District Court, the Lorizes requested the Court to enjoin the permitting and licensing of the Keller property and an injunction against the County conditional use permit.[6] It is clear from the petitioners' Motion that they seek this Court to overturn the Ohio Common Pleas and Court of Appeals decisions affirming the Board of Zoning Appeals' grant of a permit to the Kellers. This request for relief is an improper invocation of Federal Jurisdiction under the *Rooker- Feldman* doctrine. The District Court properly dismissed this case stating

> "Under 28 U.S.C. §1257, final judgments of state courts are entitled to receive full faith and credit from this court, and the subordinate federal courts do not have jurisdiction to review these final judgments of state courts because the review of such determinations can only be obtained by the United States Supreme Court by writ of certiorari. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923) (an appeal through the state courts to the U.S. Supreme Court is

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[6] The District Court did not rule upon the Motion for Preliminary Injunction Pending Appeal.

> the exclusive means by which a state court judgment may be reviewed for constitutional error); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 483-484 n. 6 (1983).[7]

While the Court of Appeals based its decision on the plaintiffs' failure to show irreparable harm, the District Court's ruling that *Rooker-Feldman* applies should be upheld, and the Lorizes' Petition should be denied.

Pursuant to the *Rooker-Feldman* doctrine, federal district courts lack subject matter jurisdiction "to engage in appellate review of state court proceedings or to adjudicate claims 'inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir. 2002). The label of civil rights action cannot confer jurisdiction on a federal court to relitigate questions previously decided in state courts. *Coogan v. Cincinnati Bar Assn.*, 431 F.2d 1209, 1211 (6th Cir. 1970). The Civil Rights Act was not designed to be used as a substitute for the right of appeal, nor as a vehicle to collaterally attack a state court judgment by re-litigating the issues already decided. *Id.*; *Tonti v. Petropoulos*, 656 F.2d 212 (6th Cir. 1981). A two-part test is used to determine whether *Rooker-Feldman* applies: 1) the federal claim is inextricably intertwined with the state court judgment, and 2) the federal claim must be a specific grievance that a law

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[7] See Report and Recommendation that the defendants' Motion to Dismiss (Docs. 14, 19) and For Judgment on the Pleadings (Doc. 25) be granted; that all claims against the non-moving defendants be *sua sponte* likewise dismissed; and that this case be closed (hereinafter Report & Recommendation) of Magistrate Black dated 12/29/05, Case No. 1:05CV306, (See Report and Recommendation, *Petition Appendix*, p. 14a).

was improperly or unconstitutionally applied, rather than a general challenge to the constitutionality of a state law. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 1523 (2005) (citations omitted). Because the facts alleged in the complaint satisfy both of these elements, the case was properly dismissed for lack of subject matter jurisdiction.

In affirming the Butler County Board of Zoning Appeals, the Ohio Twelfth District Court of Appeals specifically held that "the lower court did not abuse its discretion [in affirming the decision of the Board of Zoning Appeals] as there was evidence in the BZA findings to support its decision". *In Re: Application of Keller*, 2003-Ohio-6549, at ¶ 20 (Ohio App. 12 Dist. 2003). If this Court were to grant the Lorizes' any relief pursuant to their request for an injunction, it would necessarily require an evaluation of the Twelfth District's order in face of an acknowledgment by plaintiffs that the state court already declined them this relief. (Complaint, R. 1, ¶ 12, 59, attached to *Petition Appendix*, p. 29a). *Rooker-Feldman* prohibits such a result.

The Lorizes here have not challenged the constitutionality of Ohio laws governing zoning appeals. Rather, they requested the lower courts reverse, by injunction, the state court decision on the grounds that the state court reached an incorrect result. *Rooker-Feldman* is implicated only where plaintiffs bring a specific grievance regarding a particular decision, not where plaintiffs make a general challenge to the constitutionality of a state law as unconstitutional per se. *Exxon Mobil Corp.*, 125 S. Ct. at 1523; *Tropf v. Fidelity National Title Ins. Co.*, 289 F.3d 929, 937 (6th Cir. 2002). Accordingly, the District Court correctly dismissed the complaint and request for injunctive relief under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction.

B. The Court Lacks Jurisdiction Due to Lack of Ripeness Under *Williamson County Regional Planning Commission vs. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)

The District Court correctly held that "'[i]f a claim is unripe, Federal Courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised sua sponte if not raised by the parties.'" *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 157 (6th Cir. 1992) (other quotations and citations omitted).[8]

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-195 (1985) (*quoting Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 (note 21) (1984), this Court held that "if the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation' then a property owner 'has no claim against the government' for a taking." Ripeness not only has a component that an alleged taking victim seek compensation, but also that the victim obtain a final decision from the administrative agency before the question of whether a taking has occurred is judicially reviewable at the federal level. *Id.* at 192. While plaintiffs' petition is read as one for injunction pending appeal since the Sixth Circuit has not yet ruled on the merits as to the dismissal of all of plaintiffs' claims, a lack of jurisdiction for lack of ripeness is equally fatal to their request for injunction as to their claim for money damages. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1016.

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[8] See Report and Recommendation, *Petition Appendix*, p. 12a.

II. The Lower Courts Correctly Abstained From Reviewing the Matter

After the Lorizes filed this action in the District Court, the Butler County Court of Common Pleas dismissed the Butler County Board of Zoning Appeals, its members and the Butler County Commissioners from the ongoing and parallel State Court case in Butler County Common Pleas Case No. CV01-04-0714.[9] However, the Lorizes subsequently continued to litigate the conditional use permit in State appellate court. (See Notice of Appeal of Decision of the Zoning Board of Appeal of Butler County, Ohio, Butler County Common Pleas Case No. CV05-07-2228).[10] These cases remain open today. Several applicable abstention doctrines therefore limited the lower court's ability to proceed.

A. *Colorado River* Abstention Limits This Court's Review

The abstention doctrine established by *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976) established a balancing test for federal courts to evaluate whether to abstain from civil cases out of deference to parallel state proceedings. Five factors must guide any decision:

(1) *which court first assumed jurisdiction over the res or property involved* - in this matter, that would be

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[9]See Appendix No. 9, p. 46a.

[10]See Appendix No. 10 , p. 51a. On June 9, 2005, the Butler County Board of Zoning Appeals reviewed the conditions on the Keller property and removed some of the conditions. The Lorizes filed an appeal as to this decision, Case No. CV05-07-2228.

the Butler County Common Pleas Court (Complaint, R.1, ¶¶ 14, 27-32);

(2) *the inconvenience of the federal forum*;

(3) *the desirability of avoiding piecemeal litigation* - this case is duplicative and adds nothing to the ongoing state court litigation;

(4) *the order of filing for the state and federal actions* - this action was filed over four years after the Lorizes filed the March 2001 Complaint in state court (Complaint, R.1, ¶ 14); and

(5) *the presence of a federal question* - for all the reasons articulated in the other parts of this brief, the Lorizes failed to state a cognizable federal question as a matter of law.

Id. at 818-19 (quoted language in italics). This Court's abstention from deciding this matter would further the important policies of "conserving . . . judicial resources" and "avoiding duplicative litigation." *Id.* at 817.

B. *Pullman* Abstention Limits This Court's Review

This Court has likewise endorsed showing appropriate comity and a "scrupulous regard for the rightful independence of state governments." *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 500-501 (1941) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 457 (1919)). *Pullman* abstention is built upon the traditional avoidance of unnecessary constitutional decisions and the sovereign respect due to state courts. *Id.* It requires a federal court, faced with a constitutional challenge (or putative constitutional challenge)

to a state law (or, in this case, a state ruling), to defer the constitutional question and avoid a direct confrontation if a decision from the state court "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison v. NAACP*, 360 U.S. 167, 177 (1959). Here, deferring to the ongoing state court obviates the need for this Court's intervention.

C. *Burford* Abstention Limits This Court's Review

Finally, the *Burford* abstention doctrine - which arises from this Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) - is likewise applicable. In *Burford*, the Court held that a federal court should abstain from granting relief that will disrupt a complex state regulatory scheme. In a more recent formulation of the doctrine, this Court held:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989). In this case, the Lorizes seek to overturn permits issued by the Ohio Department of Natural Resources and County zoning decisions all of which have been approved by Ohio state courts and are *still* being

litigated in the Butler County Court of Common Pleas. Ohio has created a coherent policy with respect to a matter of substantial public concern, and this Court should not make decisions implicating it. Federal courts have repeatedly held that federal challenges to land-use permits such as the one at bar are subject to *Burford* abstention. *See, e.g., Ellis v. Gallatin Steel Co.*, 390 F. 3d 461, 479-81 (6th Cir. 2004); *McDonald v. Village of Newport*, 164 F.3d 963 (6th Cir. 1999); *Ada-Cacade Watch Co., Inc. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897, 903 (6th Cir. 1983).

In the instant case, the Lorizes want this Court to review the decisions of state and local bodies granting permits and licenses to the Ridge Wind defendants regarding the use of their land. Such a controversy is entirely a local matter, and the federal courts should abstain from exercising jurisdiction over it. Ohio R.C. § 2506.04 provides the legal basis upon which a Court of Common Pleas can reverse an administrative officer or agency. The Lorizes have already availed themselves of administrative appeals on at least two occasions with regard to the current controversy; Butler County Common Court of Common Pleas Case No. CV01-04-0714 (in which the Butler County Commissioners and the Butler County Board of Zoning Appeals and its members were dismissed in December of 2005) and more recently in Butler County Court of Common Pleas Case No. CV05-07-2228 (still pending). A federal court's review would therefore be improper. For all these reasons, this Court should uphold the lower court's denial of plaintiffs' motion for an injunction pending appeal.

III. Petitioners Are Not Entitled to an Injunction When a Suit For Compensation Can Be Brought

As stated in *Ruckelshaus v. Monsanto Co.*, this Court held

> "equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."

467 U.S. at 1016 (citations omitted). Petitioners do not claim that the Butler County Board of Zoning Appeals is not a duly authorized body under Ohio state law, nor have they alleged that the Butler County Zoning ordinances were defective or otherwise not in full force and effect. Thus, the actions of the Butler County Board of Zoning Appeals were, as this Court stated in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (unanimous opinion), typical

> "'government regulation [which] by definition [,] involves the adjustment of rights for the public good' *Andrus v. Allard*, 444 U.S. 51, 65, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1997) [noting] that 'government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' [*Pennsylvania Coal Co. v.] Mahon*, [260 U.S. 393,] 413 [(1922)]."

A. Ohio Has Provisions For Awarding Compensation For Persons Whose Property Has Been Condemned

The Lorizes have statutory remedies under Chapter 163 of the Ohio Revised Code.[11] The Ohio system even provides for the payment of interest to the property owner to ensure full compensation. R.C. 163.17.[12] The Ohio system goes so far as to make payments to persons displaced from their dwelling so they can acquire a comparable replacement dwelling. R.C. 163.54[13] and .55.[14] Also, incidental expenses may be paid to the land owner. R.C. 163.61[15]. Therefore, Ohio condemnation statutes do provide compensation, contrary to the Lorizes' contention.

B. In Ohio, Mandamus Is the Appropriate Procedure to Seek Compensation When a Case of Condemnation Has Not Been Brought

The Sixth Circuit Court of Appeals noted in *Coles v. Granville*, 448 F.3d 853, 862 (6th Cir. 2006) (quoting *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 700 (1996):

> "'In regulatory cases, where the government has fulfilled its obligation to provide notice to the property

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[11] See Appendix No. 12, pp.57a - 60a for statutes R.C. 163.05 and 163.09.

[12] See Appendix No. 12, p. 61a - 62a

[13] See Appendix No. 12, p. 63a.

[14] See Appendix No. 12, p. 64a.

[15] See Appendix No. 12, p. 65a.

> owner, it may be fair to place the burden of making the next move on the landowner. It may make sense to require landowners to pursue relief through administrative appeals and the mandatory injunction process when the landowners know in advance that the government is planning action that threatens their property . . .since there are generally numerous opportunities available to landowners to be heard and to attempt to prevent a proposed zoning ordinance from taking effect, or to reach a compromise with the authorities that permit some alternative use of the land.'"

While in *Kruse* the court also held that mandamus does not afford an appropriate remedy for one whose land was taken by physical invasion,74 F.3d at 700, *Coles* held that this was a decision only made necessary due to the temporal flux of Ohio state law which had since resolved through a minimum of six Ohio Supreme Court decisions affirming the use of mandamus and the general acceptance of mandamus by Ohio intermediate courts. *Coles*, 448 F.3d at 863 (citations omitted).

Thus, Ohio's remedy of mandamus is now firmly established and Ohio provides for a statutory scheme to compensate property owners whose land has allegedly been taken, facts which weigh heavily against the prospect of injunctive relief. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (citations omitted).

IV. The State Agency Decision Which Petitioners Find Objectionable Merely Affected Their Property Interests Through A Proper Exercise of State Police Power Adjusting of the Benefits and Burdens of Property Ownership and Does Not Qualify For Application of a Per Se Taking Rule or Injunction

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) (emphasis added, italics in original), this Court held that

> "the *functional* basis for permitting the government, by regulation, to affect property values without compensation-that 'government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,] 413 [(1922)] - does not apply to the relative rare situations where the government has deprived a landowner of <u>all</u> economically beneficial uses."

See also Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. at 199. The petitioners have failed to establish that they have been deprived of all beneficial uses. They merely argue that their two chosen uses have been interfered with as a result of the business of Ridge Wind.

This Court, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-540 (2005), discussed the practical limitations of per se rules such as found in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (depriving an owner of all economically beneficial use) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (granting rights

over the property of another resulting in a physical invasion, no matter how minor) and the balancing test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (requiring the evaluation of the economic impact of the regulation, its interference with distinct investment backed expectations, the character of the governmental action and whether the regulation was merely an adjusting of the benefits and burdens of economic life).[16] As noted throughout this response to the Petition, there are many reasons why an injunction does not lie.[17] Most notably among these is that the petitioners do not fall within the narrowly prescribed per se rules requiring compensation or an injunction.

A. Petitioners' Claim Is An As Applied Challenge, Not a Facial Challenge, For Which An Injunction Is Not Available

As noted in Section I(A), petitioners are making an as applied challenge. However, the jurisprudence is clear that injunctions are generally only available for pre-enforcement facial challenges. *Hynes v. Grimes Packing Co.*, 337 U.S. 86

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[16] Similar situations as between petitioners and the Ridge Wind defendants could have arisen with other commercial uses. Had Ridge Wind been a golf course or driving range, petitioners could have suffered overshot golf balls. Had Ridge Wind been a motocross course, petitioners could have suffered noise, dust, sediment laden run off and increased air pollution. Had Ridge Wind been a landfill, petitioners could have suffered increased noise, odor and scavengers.

[17] See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (citations omitted).

(1949); *Daniels v. Area Planning Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002). Other cases cited by petitioners for the proposition that an injunction is available are not applicable. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (drug forfeiture laws require due process pre-seizure); *Greene v. Lindsey*, 456 U.S. 444, 450-451 (1982) (requiring actual service for notice of eviction proceedings). In *Duke Power Company v. Carolina Study Group, Inc.*, 438 U.S. 59, 71 fn. 15, (1978), this Court indicated where an individual is subject to a taking, he can seek a declaration as to the constitutionality of the legislation under the Declaratory Judgment Act. However, petitioners are not seeking advanced assurance of adequate compensation or a declaration of unconstitutionality regarding threatened action. They are seeking to have this Court reverse the decisions of the Butler County Board of Zoning Appeals, Butler County Court of Common Pleas and the Ohio Twelfth District Court of Appeals allowing a commercial recreational use permit. As this is not a facial challenge but an as applied challenge, injunctive relief is not available and as noted above, *Rooker-Feldman* applies.

B. Petitioners' Rights to Protect Their Property Have Not Been Criminalized

Petitioners discuss several cases as standing for the proposition that an alleged taking victim is entitled to an injunction. While some of these cases can be distinguished on the basis that they were facial challenges to the constitutionality of laws, some were as applied challenges. However, petitioners' cited cases of takings of rights appurtenant to real property, whether as applied challenges or facial challenges, which granted injunctions can be distinguished on the fact that the alleged taking victim's

ability to protect or enjoy its property rights had been criminalized.

In *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 97 (1949), the Regional Director, Fish & Wildlife Service, Dept. of the Interior Frank Hynes was charged with the duty of enforcing Acts of Congress and regulations issued thereunder as related to waters in the proximity of Kodiak Island in Alaska. Under one regulation, Hynes "threatened the seizure of all boats and equipment used to fish in the waters covered by this regulation to respondents' substantial and irreparable loss." *Id.* Both the District Court and the Ninth Circuit Court of Appeals had held the regulation invalid and enjoined its enforcement. *Id.* at 96. Violation of the applicable regulation could result in fines, imprisonment, seizure of boats, gear, equipment, and the catch with forfeiture to the United States. *Id.* at 99. The Court held

> "the sanctions deny to respondents an adequate remedy at law for to challenge the regulation in an ordinary criminal proceeding is to hazard a loss against the payment of a license fee in compliance with the fishing rules of the natives. Yet, to stay out of the reservation prevents the profitable operation of the canaries."[18]

Id. at 99. In light of the criminalization of the ability to profitably carry on their businesses as they had in the past and given the statute's invalidity, injunctive relief was necessary for the protection of property rights in the context of the facial

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[18] The regulation gave exclusive right to the native Indians to issue permits for fishing inside a restricted area set by the Indians which area was protected by the regulation. *Id.* at 98.

challenge. *Id.* at 98-99. Thus, *Hynes* is readily distinguishable from the facts of the case at bar as the plaintiffs are making an as applied challenge and have not alleged a criminalization of their ability to protect their property.

Petitioners, assuming it is determined that they have suffered a private taking, cite *Montgomery v. Carter County*, 226 F.3d 758 (6th Cir. 2000), for the proposition that they are entitled to have the taking desist (i.e., an injunction) as well as to more than "just compensation." *Petition* at p. 19 (citing *Montgomery v. Carter County*, 266 F. 3d at766).[19] However, the *Montgomery* court does not explore the issue of equitable relief stating merely

> "private-use takings, rare as they may be, are unconstitutional regardless of whether just compensation is paid. *See, e.g., [Hawaii Housing Authority v.] Midkiff*, 467 U.S. [229,] 245, 104 S. Ct. 2321 [(1984)] ('a purely private taking could not withstand the scrutiny of the public use requirements; it would serve no legitimate purpose of government and would thus be void.'); *Porter v. DiBlasio*, 93 F.3d 301, 310 (7th Cir. 1996) ('the Constitution forbids a taking executed for no other reason than to confer a private benefit on a particular private party, even when the taking is compensated.'). Moreover, eminent domain proceedings do not supply the appropriate remedy. Unwilling landowners must accept being forcibly bought out by the state if the

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[19] *Montgomery v. Carter County*, was incorrectly cited by petitioners at p. 4 as "266 F.3d 758, 766." The correct cite is 226 F.3d 758.

> purchase is for a public use and if just compensation (which is 'fair market value,' *Gamble [v. Eau Claire County]*, 5 F.3d [285,] 287 [(7th Cir. 1993)] is paid. A person whose property is confiscated for a strictly private use need not settle for 'just compensation.'"

Montgomery, 226 F.3d at 766-767.

Even if *Montgomery* could be construed as permitting injunctive relief to enjoin a private-use taking, it is distinguishable on multiple grounds from the claims of the petitioners. The facts in *Montgomery* were that Mary L. Nave had owned property which included an eleven foot wide driveway more than five hundred feet long. *Id.* at 761. At some point in time, the driveway became listed as a county road. *Id.* at 762. After victimized by two attempted robberies, one successful, she wanted to erect a fence and gate on the driveway. *Id.* At about this same time, her daughter, in trying to take care an underground water pipe, was informed that the driveway was a public road. *Id.* at 763. Eventually, the county took the position that the driveway was a public road. *Id.* The court noted Tennessee law prohibited the obstruction of public roads and that fencing or gating of the driveway would have been an illegal act. *Id.* at 762. Thus, the declaration that the driveway was a county road allowed any member of the public to occupy the road and gave Nave no right to exclude them. Additionally, attempts to exclude members of the public were criminalized by Tennessee statute. In contrast, petitioners' right to exclude members of the public from their property is intact. Likewise, their ability to fence off their property has not been criminalized. Thus, the facts of *Montgomery v. Carter County* are not analogous to the facts of the petitioners' case.

V. Petitioners Are Not Otherwise Entitled to Injunctive Relief for Any of the Alleged Constitutional Violations They Raise

The petitioners allege that their substantive due process rights have been violated by state action qualifying petitioners for injunctive relief due to irreparable harm. *Petition* at p. 28 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). However, the examples that *Lingle* cites were failing "to meet the 'public use' requirement or [to be] so arbitrary as to violate due process . . ." *Id.* at 543. *Lingle* clarified that a taking analysis and a due process analysis are two separate issues. *Id.* at 540. In *Lingle*, this Court noted that the due process test to challenge a zoning ordinance announced in *Village of Euclid v. Ambler Realty Co.*, 72 U.S. 365, 395 (1926), which held "that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not 'clearly or arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare*,'" was still proper due process analysis for constitutionality. *Lingle*, 544 U.S. at 541 (emphasis in original). As noted previously, many conditions were imposed upon the Kellers for the public health, safety and general welfare based upon the testimony presented to the Board of Zoning Appeals. While there could have been more restrictive conditions, petitioners cannot establish that the decision was clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals and general welfare. Thus, petitioners cannot establish a substantive due process violation by the Board of Zoning Appeals and are not entitled to an injunction as the BZA's decision was clearly neither arbitrary nor unreasonable.

A. Petitioners' Due Process Claims Are Premature Prior To a Final State Agency Decision

This Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, clearly held that a due process claim cannot be ruled upon until the person affected obtains a final decision. 473 U.S. at 199-200; *See also Covington Court Limited v. Village of Oakbrook*, 77 F.3d 177, 179 (7th Cir. 1996) (citing *Williamson County*, 473 U.S. at 188-189). As discussed in I(B) above, petitioners have failed to satisfy the finality requirement. Therefore, the petition should be dismissed.

B. Petitioners Fail to Show Entitlement to an Injunction Pending Appeal

Even if there had been a final decision, a substantive due process violation through a land-use regulation entitles the victim only to "authorized and appropriate actual damages." *Id.* at 197 (citations omitted). In addition to the fact that the petitioners have not suffered irreparable harm from the permit issued to the Kellers, petitioners' alleged first amendment claim does not entitle them to an injunction since the alleged violation was neither threatened nor occurring at the time of the relief being sought. *See Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). The general test of assessing whether someone is entitled to a preliminary injunction was set forth in *Southwest Williamson County Community Association v. Slater*, 243 F.3d 270, 277 (6th Cir. 2001) (interior quotations omitted):

> "a district court must consider: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a

> preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a preliminary injunction."

As already noted, actual damages are the appropriate measure for relief. However, due to the lack of finality with the petitioners failing to request variances or other relief to protect their property, the effect of the potential application of zoning by the Board of Zoning Appeals on petitioners' property cannot be measured. *See Williamson County Regional Planning Commission,* 473 U.S. at 200.

While the Sixth Circuit indicated petitioners may have a chance of success on the merits, it did not offer an opinion as to which, if any, of the myriad of claims the petitioners have brought would likely have success. *Petition Appendix,* p. 2a. Likewise, there was a lack of discussion as to harm to others and the public interest. *Petition Appendix*, pp. 2a-3a. The potential of an inunction causing harm to others such as the Kellers is obvious. Suffering an injunction would cause a complete loss of their business revenue related to their commercial recreational use permit and may also expose them to additional liabilities as a result of not being able to fulfill obligations to patrons. Residents of Butler County also may be harmed if an injunction were to issue as they would likely be forced to travel farther to find a comparable facility for field trials and other sporting events. Lastly, the public interest would not be served by an injunction against a permit appropriately issued after hearings and proper notice to affected landowners and multiple state court appeals.

Kallstrom v. City of Columbus, 163 F.3d 1055, (6th Cir. 1998) is also distinguishable from the facts of petitioners' claims. In *Kallstrom*, the City of Columbus threatened of release confidential personal information of undercover police

officers to the criminal gang subjects of their investigation implicating their fundamental privacy rights under the due process clause. *Id.* at 1060-1061. However, the type of governmental action in *Kallstrom* is not the same as faced by the petitioners. In the instant case, the petitioners have been subject to acts of private individuals, perhaps careless, shooting into their property during field trial events. As discussed above, the petitioners did not seek finality with respect to the impact of the grant of the commercial recreational use permit to the Kellers. Therefore, comparing the undercover officers' complete lack of control over their identity and personal information once it is disclosed is not the same as the situation faced by the Lorizes when they have failed to explore all of the potential relief that could be afforded to them through the county board of zoning appeals. Likewise, in *Kallstrom*, the potential recipients of the confidential, personal information had reasons to despise, hate and seek retribution against the officers for their investigation. Unlike in *Kallstrom*, the patrons of the Kellers who have come to the property to conduct field trials have not been criminally investigated or prosecuted by the Lorizes.[20] Although, patrons could potentially be sued civilly should they cause any damage to the Loriz property or subject to prosecution for any criminal violations. However, these consequences would be no different for anyone who damages someone else's property while in the course of hunting or sporting activities.

CONCLUSION

This Court should deny plaintiffs' petition for writ of certiorari. Petitioners have continually failed to take the

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[20] See Complaint, ¶ 45, *Petition Appendix*, p. 40a.

appropriate steps which are prerequisites to properly requesting federal relief. This Court should abstain from interfering with the state agency and court proceedings which are currently ongoing. This Court should refuse injunctive relief since the alleged taking claim is not ripe for federal action. It is doubtful that plaintiffs could succeed on the merits even if they had met the jurisdictional requirements of a taking claim when this Court considers that the outcome of the nuisance action in state court will likely be determative of the litigation between the Kellers and the Lorizes. Butler County requests that this Court deny petitioners' request for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Violation Number 1
Date February 28, 2001

NOTICE OF VIOLATION
UNDER BUTLER COUNTY ZONING RESOLUTION
BUILDING AND ZONING DEPARTMENT
130 HIGH STREET
HAMILTON, OHIO 45011

Charles & Christopher Keller
1242 Bauer Rd.
Somerville, Ohio 45064

Dear Mr. Keller:

You are hereby notified that your property in Milford Twp. Somerville Ohio, 45064 parcel #'s F2610-012-000-028, F2610-012-000-036 & F2610-012-000-037 is used in violation of Butler County Zoning Resolution, Section(s) 6.01, 6.08, 7.01 & 7.03 in the following manner: Running of a commercial recreation facility from your property in a open yard A-1 Agricultural Zoning District.

You are hereby requested to discontinue, cease and desist this violation within ten (10) days from the date of the NOTICE OF VIOLATION in compliance with the requirement of the Zoning Resolution, Section 25.1 by: permanently ceasing the use and removing all business activities from the property unless and until you secure necessary Zoning authorization to conduct a commercial recreation activity on this property.

Failure to comply will result in legal action begin taken!

If you have further question regarding this matter, or if you wish to file an appeal from this order with the County Board of Zoning Appeals, please contact my office @ (513) 887-3204.

Respectfully,

/s/_____

James M. Fox
Zoning & Drainage Inspector

APPENDIX 2

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

CASE NO.: CV2001-04-0714

[Filed April 9, 2001]

MICHAEL & CARA LORIZ)
1566 OXFORD-MIDDLETOWN ROAD)
HAMILTON, OHIO 45013)
Plaintiffs,)
)
v.)
)
CHARLES E. KELLER)
1242 BAUER ROAD)
SOMERVILLE, OHIO 45064)
)
AND)
)
CHRISTOPHER E. KELLER)
1242 BAUER ROAD)
SOMERVILLE, OHIO 45064)
)
AND)
)
RIDGEWIND QUAIL FARMS)
1242 BAUER ROAD)
SOMERVILLE, OHIO 45064)

AND)
)
NATIONAL SHOOT TO RETRIEVE)
ASSOCIATION-OHIO REGION C/O)
REGION PRESIDENT: DION BLISS)
642 SANDUSKY STREET)
ASHLAND, OHIO 44805)
)
AND)
)
MICHAEL J. BUDZIK CHIEF,)
DIVISION OF WILDLIFE, OHIO)
DEPARTMENT OF NATURAL)
RESOURCES)
1840 BELCHER DRIVE)
BUILDING G-3)
COLUMBUS, OHIO 43224)
Defendants.)
)

COMPLAINT OTHER CIVIL
WITH JURY DEMAND

Now come the Plaintiffs, Michael and Cara Loriz, through their Complaint, and causes of action, state as follows:

I. PARTIES

1. Plaintiffs, Michael and Cara Loriz (hereinafter referred to as "Loriz"), are husband and wife, and are the owners of residential property located at 1566 Oxford-Middletown Road, Milford Township, Butler County, Ohio.

2. Defendants Charles E. Keller and Christopher E. Keller are the owners of land located at 6508 State Road, Milford

Township, Butler County, Ohio, and more specifically defined in the Butler County Auditor's Property records as comprised of parcel numbers F2610-012-000-028, F2610-012-000-036, and F2610-012-000-037 (hereinafter referred to as the "Keller Farm").

3. The Defendants Charles E. Keller and Christopher E. Keller (hereinafter referred to as "Kellers"), are residents of Butler County, Ohio, residing at 1242 Bauer Road, Somerville, Butler County, Ohio.

4. The Defendant Ridgewind Quail Farms, is an unincorporated Field Trial Club, as that term is used in Title XV Conservation of Natural Resources, Ohio Revised Code 1533 et seq., owned and operated by Defendant Charles E. Keller. Ridgewind Quail Farms principle place of business is 1242 Bauer Road, Somerville, Butler County, Ohio.

5. The Defendant National Shoot to Retrieve Association - Ohio Region, is an unincorporated association, operated by Regional President David Bliss whose principle place of business is 642 Sandusky St. Ashland, OH 44805.

6. Michael J. Budzik is the Chief of the Wildlife Division, for the Ohio Department of Natural Resources, an agency within the State of Ohio, whose jurisdiction spans the State.

7. Venue properly lies in the Court of Common Pleas, Butler County, State of Ohio pursuant to Civ.R. 3. Jurisdiction properly lies with the Court of Common Pleas, Butler County, State of Ohio.

II. OPERTATIVE FACTS

8. The Loriz property is comprised of approximately 47

acres, a portion of which shares a common property line with the Keller Farm. The Keller Farm is comprised of approximately 180 acres. Both properties are zoned A-1 (Agricultural District) as defined in the Butler County Zoning Resolutions as revised 11 March 2000.

9. The Loriz property is mostly wooded, and is being reforested under the State of Ohio's State Stewardship Incentive plan.

10. The Keller Farm is primarily cultivated fields.

11. The Loriz family residence is located less than 200 feet from the property line with the Keller Farm.

12. On or about November 2000, the Defendants began to advertise hunting, under the name Ridgewind Quail Farm. Advertising was accomplished by the posting of signs in the area surrounding Defendants' property located at 6508 State Road, with the name Ridgewind Quail Farm, combined with a phone number with the number's suffix as "HUNT."

13. On or about 10 May 2000, Charles E. Keller applied and received approval for a Dog Training Grounds Application and Permit, with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.191. (Copy of Permit application attached as Plaintiffs' Exhibit "A" and hereinafter referred to as "Training Permit".)

14. The Training Permit failed to provide a proper legal description of the property where the training was to be conducted.

15. On or about 10 May 2000, Charles E. Keller applied for a Commercial Wild Animal Propagation Permit

Application and License, with the Ohio Department of Natural-Resources, pursuant to Ohio Revised Code 1533.71. (Copy of permit application attached as Plaintiffs' Exhibit "B" and hereinafter referred to as "Propagation Permit".)

16. The Propagation Permit specified the Bobwhite Quail were to be held at the Keller Farm.

17. At a date, as yet unknown, but within the preceding 10 months, Charles E. Keller applied for a Field Trial Club permit with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.19.

18. On or about 20 and 21 January 2001, the Loriz family was awakened to the sound of numerous shotguns being fired, men shouting, dogs barking, and All Terrain Vehicles running. This continued during the course of the entire day of 20 January 2001 and was repeated on 21 January 2001. The Loriz's subsequently discovered that the activity they heard and witnessed was a commercial Quail hunt, and dog field trials, organized and operated by Charles and Christopher Keller, in their individual capacities, and through a field trial club known as Ridgewind Quail Farm. Additionally, the trial was advertised, sponsored and conducted by Defendant National Shoot to Retrieve Association - Ohio Region. This trial was approved by the Defendant, Division of Wildlife, Ohio Department of Natural Resources. At the conclusion of the trials, awards were presented to the top three participants in various categories. The aforementioned activities occurred within 200 feet of the Loriz family residence.

19. On or about 24 and 25 March 2001, a second field trial was conducted upon the Keller Farm again, awakening the Loriz family to the sound of numerous shotguns being fired, men shouting, dogs barking, and All Terrain Vehicles

running. This continued during the course of the entire day of 24 March 2001 and was repeated on 25 March 2001. The Loriz's subsequently discovered that the activity they heard and witnessed was a commercial Quail hunt, and dog field trials, organized and operated by Charles and Christopher Keller, in their individual capacities, and through a field trial club known as Ridgewind Quail Farm. Additionally, the trial was advertised, sponsored and conducted by Defendant National Shoot to Retrieve Association - Ohio Region. This trial was approved by the Defendant, Division of Wildlife, Ohio Department of Natural Resources. At the conclusion of the trials, awards were presented to the top three participants in various categories. The aforementioned activities occurred within 200 feet of the Loriz family residence.

20. Other field trials, and activities envisioned by the Field Trial permits, have occurred on the Keller Farm in the preceding six months.

21. The Kellers constructed, or caused to be constructed, two wooden towers, in excess of fifteen feet in height, upon the Keller Farm and are utilized judging the Field Trials which were the subject of the aforementioned permits. Such towers are within several hundred feet of the Loriz family residence.

22. The 20 and 21 January 2001 activities that occurred on the Keller Farm, were field trials, as that term is defined in the O.R.C. 1533 *et. seq.* The Kellers, nor Ridgewind Quail Farms, nor the National Shoot to Retrieve Association - Ohio Region were in compliance with the signage requirements of O.R.C. 1533.22.

23. The 20 and 21 January 2001 activities that occurred on the Keller Farm, and the activities occurring on

24 and 25 March 2001, as well as the recently constructed two towers are all in violation of Articles 6 and 7 of the Butler County Zoning Resolutions as revised 11 March 2000.

24. On 28 February 2001, the Butler County Building and Zoning Department issued a "Notice of Violation Under Butler County Zoning Resolution." (copy attached as Plaintiffs' Exhibit "C"). The aforementioned Notice of Violation specifically identified violations of Sections 6.01, 6.08, 7.01 and 7.03 of the Butler County Zoning Resolutions as revised 11 March 2000.

25. Participants of the 20 and 21 January 2001 activities originating upon the Keller Farm, trespassed upon the Loriz property.

26. The activities that occurred on 20-21 January 2001 and 24-25 March 2001, upon the Keller Farm, as well as at other times within the past six months have caused the Loriz family to fear walking outside on their own property in an area that is in close proximity to the aforementioned activities for fear of being stricken by shotgun pellets emanating from the activities occurring upon the Keller Farm.

27. The Defendant, Michael J. Budzik Chief of the Division of Wildlife, Ohio Department of Natural Resources (hereinafter referred to as "ODNR"), granted, directly or through one of his agents, permits to Charles E. Keller (attached as Plaintiffs' Exhibits A & B) granting permission from the State of Ohio. The granting of such permits, without any consideration of the property rights of adjoining property owners, constitutes a State sanctioned taking of private property without due process and is therefore unconstitutional, as it is in violation of the Ohio Constitution and the U.S. Constitution.

COUNT ONE
VIOLATION OF THE BUTLER COUNTY ZONING RESOLUTIONS

28. Plaintiffs repeat Paragraphs one (1) through twenty-seven (27) as if fully rewritten herein.

29. The Defendants, the Kellers and Ridgewind Quail Farm, are in violation of the Butler County Zoning Resolutions, and such violations result in the Loriz loss of Quiet Enjoyment, such violations constitute a wrongful taking of real property, as the Loriz may not use that portion of their property adjoining the Keller Farm, when field trial activities are taking place. The Kellers use the Loriz wooded property to provide "cover" for Quail they raise and release for field trials unjustly enriches them at the Loriz expense.

30. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT TWO
LOSS OF QUIET ENJOYMENT

31. Plaintiffs repeat Paragraphs one (1) through thirty (30) as if fully rewritten herein.

32. The Field Trial activities identified above, are permitted by the Defendants, the Kellers and Ridgewind Quail Farm, and result in the Loriz loss of Quiet Enjoyment. The activities preclude the Loriz from enjoying their property in a manner to be expected for property zoned A-1 Agricultural as set forth above.

33. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT THREE
TRESSPASS TO LAND

34. Plaintiffs repeat Paragraphs one (1) through thirty-three (33) as if fully rewritten herein.

35. The Defendants, the Kellers, Ridgewind Quail Farm and the National Shoot to Retrieve Association - Ohio Region, failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, resulted in the Loriz property being trespassed upon.

36. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT FOUR
NUISANCE

37. Plaintiffs repeat Paragraphs one (1) through thirty-six (36) as if fully rewritten herein.

38. The Defendants, the Kellers, Ridgewind Quail Farm and the National Shoot to Retrieve Association - Ohio Region, actions constitute a Nuisance, due to the Defendants negligent failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio

Revised Code. 1533.22, and their failure to wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, such that participants in the Field Trials are firing their weapons in close proximity to the Loriz family home, thereby creating a potential and unreasonable risk of harm.

39. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT FIVE
PRIVATE TAKING OF REAL PROPERTY

40. Plaintiffs repeat Paragraphs one (1) through thirty-nine (39) as if fully rewritten herein.

41. The Defendants, the Kellers, Ridgewind Quail Farm and the National Shoot to Retrieve Association - Ohio Region, actions constitute a Private Taking of Real Property, due to the Defendants negligent failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, such that participants in the Field Trials are firing their weapons in close proximity to the Loriz family home and adjacent property, creating a potential and unreasonable risk that someone on the Loriz property may be struck by shot from participants in the Field Trail. Such risk, thereby precludes a reasonable and prudent person from utilizing their personal property for their own use and enjoyment during the aforementioned field trials.

42. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT SIX
VIOLATION OF DUE PROCESS RIGHTS

43. Plaintiffs repeat Paragraphs one (1) through forty-two (42) as if fully rewritten herein.

44. The Defendant's, ODNR, granting of the Training Permit, the Propagation Permit, and Field Trial Club permit constitute a taking of the Loriz property without just review or compensation and deprive Loriz of his due process rights, such that ODNR's granting of the permits is unconstitutional under the Ohio and U.S. Constitutions.

45. Ohio Revised .Code 1533.19 Field Trial Club Permits is unconstitutional, as it results in State sanctioned activities which have resulted in the private taking of property, and done so with out any regard for adjoining owner's due process rights. The state failed to provide notice and an opportunity to be heard at a meaningful time and in a meaningful manner where the state seeks to infringe a property interest. Such actions are in violation of the Ohio Constitution, to include Section 19, Article I, well as the United States Constitution via the Fourteenth Amendment.

46. As a direct and proximate result of the Defends actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

WHEREFORE, Plaintiffs pray that this Court grant judgment in an amount in excess of Twenty-Five Thousand Dollars ($25,000.00), representing the damages suffered by

Plaintiffs as a result of Defendants violation of the Zoning Resolutions, loss of quiet enjoyment, trespass to land, nuisance, private taking of real property, and violation of Plaintiffs' Due Process Rights, plus court costs, punitive damages, attorney's fees, and all other relief that this Court deems fit.

Respectfully Submitted,

BRANDABUR & BOWLING
A Legal Professional Association
/s/_____
Michael J. Brandabur (OH #0067246)
Plaintiffs' Trial Attorney
306 South Third Street
Hamilton, Ohio 45011
Phone Number: 513.892.3400

JURY DEMAND

The Plaintiffs herein requests this court empanel a jury to hear the within cause of action.

/s/_____
Michael J. Brandabur (OH #0067246)
Plaintiffs' Trial Attorney

APPENDIX 3

BUTLER COUNTY, OHIO
BOARD OF COMMISSIONERS

Commissioners
Charles R. Furmon
Courtney E. Combs
Michael A. Fox

Resolution Concerning a Variance from the Zoning Resolution of Butler County Resolution No. 01-26C

WHEREAS, Application of Charles E. Keller Case Number BZA01-26C submitted to the Board of Zoning Appeals, to grant a Conditional Use from/under Section(s) 6.01, 6.08, 7.01, 7.03, 7.0301, 26.5, 26.51, 26.52 & 26.52203 of the Butler County Zoning Resolution for permission to: conduct a commercial bird shooting preserve from his property.

Location of said property: 6508 State Road
Somerville, Ohio 45064

WHEREAS, Said application was reviewed by the Board at a regular meeting held in conjunction therewith on July 17, 2001.

WHEREAS, an appropriate study of said application was made by the Board; and

NOW THEREFORE BE IT RESOLVED, that on the basis of the above and by virtue of the authority vested in the Board

of Zoning Appeals by law, said Board herewith approved this request with the following stipulations:

1. There will be at least 10 hard surface parking spaces.
2. The drive must be concrete or blacktop on the common driveway from State Road to where it enters Mr. Keller's property, to eliminate dust.
3. There must be a landscape buffer on both sides of the rear boundaries.
4. There will be no direct lighting or glare on any other property owner.
5. There cannot be a sign any larger than 1 sq. ft. stating the area.
6. This will be a Conditional Use only for Mr. Keller. Any new owner must come before the Board.
7. There will be a safety zone established and clearly marked on all boundaries.
8. There will be a 100-foot buffer along any adjoining property line that requests it.
9. The area used for the commercial hunting must be entirely fenced and signed to the Ohio Department of Natural Resource's specifications.
10. There will be an annual review each year by the Board, where the citizens of the community have the right to come in and talk about any problems that the operation is creating.
11. All proper documentation must be obtained that is required by the State of Ohio Department of Wildlife for any of the operations, raising of game birds and harvesting of game birds.

12. There will be no birds or deer that are killed, left to rot. Anything killed must be taken or disposed of properly.
13. The hours of operation will be 8:00 A.M. to 6:00 P.M.
14. Commercial hunting will be September 1 thru April 30.
15. Any field trials that are done will have 2 hunters, 2 judges, 2 dogs and possibly 2 gunners.
16. Activity will be solely on parcels F2610-012.000-037 and F2610-012.000-036.
17. There must be a 100-yard buffer zone between Mr. Loriz's property and the hunting area.

BE IT FINALLY RESOLVED, that a copy of this resolution be forwarded to the applicant and that said constitute an official notice.

July 26, 2001 /s/_____
Lee O. Steenken, Chair

Hamilton, Ohio /s/_____
William E. Balsinger, Secretary

APPENDIX 4

BOARD OF APPEALS OF BUTLER COUNTY, OHIO

CASE NO.: 2001 08 1777

[Filed August 6, 2001]

IN RE: APPLICATION OF)
CHARLES E. KELLER)
)

ZONING BOARD OF APPEALS
CASE NUMBER BXM01-26C

NOTICE OF APPEAL OF DECISION OF THE ZONING BOARD OF APPEALS OF BUTLER, COUNTY, OHIO

The undersigned, Michael Loriz and Cara Loriz, and by their counsel, Gregory E. Hatcher, hereby give notice of their appeal to the Common Pleas Court of Butler County, Ohio, from the final order, adjudication or decision of the Zoning Board of Appeals of Butler County, Ohio, made and rendered on the 26th day of July, 2001, in which it was decided by Resolution and held that Charles E. Keller was granted a variance granting a conditional use to conduct a commercial bird shooting preserve on his property located at 6508 State Road, Somerville, Ohio 45064, with certain stipulations. A

copy of the Resolution is attached hereto and marked Exhibit "A".

Respectively submitted,

/s/ _____
MICHAEL LORIZ

/s/ _____
CARA LORIZ

/s/ _____
GREGORY E. HATCHER
Attorney for Michael and Cara Loriz
Ohio Sup. Ct. Reg. No. 0021559
301 High St., Suite 400
Hamilton, Ohio 45011
Telephone: (513) 867-1856

APPENDIX 5

In The Common Pleas Court
Butler County, Ohio

Case No. CV 2001 04 0714
Case No. CV01-08-1777 (Inactive)

[Filed December 11, 2001]

CARA LORIZ	)
Plaintiff	)
	)
v.	)
	)
CHARLES E. KELLER	)
Defendants	)
	)
AND	)
	)
MICHAEL LORIZ	)
Plaintiff	)
	)
v.	)
	)
BUTLER COUNTY BOARD	)
OF ZONING, et al.	)
Defendants	)
	)

ORDER FOR CASE CONSOLIDATION

It appearing to the Court that the above captioned matters involve similar issues of law and fact, it is hereby ordered that these cases be consolidated into the above listed active case number.

SO ORDERED,

/s/ _____
Judge Patricia S. Oney

/s/ _____
Judge Michael J. Sage

APPENDIX 6

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

CASE NO.: CV2001-04-0714

[Filed February 20, 2002]

MICHAEL LORIZ	)
1566 OXFORD-MIDDLETOWN ROAD	)
HAMILTON, OHIO 45013	)
	)
AND	)
	)
CARA LORIZ	)
1566 OXFORD-MIDDLETOWN ROAD	)
HAMILTON, OHIO 45013	)
Plaintiffs,	)
	)
v.	)
	)
CHARLES E. KELLER	)
1242 BAUER ROAD	)
SOMERVILLE, OHIO 45064	)
	)
AND	)
	)
CHRISTOPHER E. KELLER	)
1242 BAUER ROAD	)
SOMERVILLE, OHIO 45064	)

AND)
)
MICHAEL SIMMONS)
3047 KIRCHLING ROAD)
HAMILTON, OHIO 45013)
)
AND)
)
RIDGEWIND QUAIL FARMS)
1242 BAUER ROAD)
SOMERVILLE, OHIO 45064)
)
AND)
)
NATIONAL SHOOT TO RETIREVE)
ASSOCIATION-OHIO REGION C/O)
REGION PRESIDENT: DION BLISS)
642 SANDUSKY STREET)
ASHLAND, OHIO 44805)
)
AND)
)
BUTLER COUNTY BOARD OF)
ZONING APPEALS)
LEE STEENKEN)
JOHN ZBORIL)
ALAN DANIEL)
THOMAS BEVINGTON)
GARY SALMON)
130 HIGH STREET)
HAMILTON, OHIO 45011)
)
AND)
)

COURTNEY COMBS)
BUTLER COUNTY COMMISSIONER)
130 HIGH STREET)
HAMILTON, OHIO 45011)
)
AND)
)
MICHAEL FOX)
BUTLER COUNTY COMMISSIONER)
130 HIGH STREET)
HAMILTON, OHIO 45011)
)
AND)
)
CHARLES FURMON)
BUTLER COUNTY COMMISSIONER)
130 HIGH STREET)
HAMILTON, OHIO 45011)
Defendants.)
)

AMENDED COMPLAINT OTHER CIVIL WITH JURY DEMAND

Now comes the Plaintiffs, Michael and Cara Loriz, through counsel, and for their Complaint, and causes of action, state as follows:

I. PARTIES

1. Plaintiffs, Michael and Cara Loriz, (hereinafter referred to as "Loriz"), are husband and wife, and are the owners of residential property located at 1566 Oxford-Middletown Road, Milford Township, Butler County, Ohio.

2. Defendants, Charles E. Keller and Christopher E. Keller, are the owners of land located at 6508 State Road, Milford Township, Butler County, Ohio, and more specifically defined in the Butler County Auditor's Property records as comprised of Parcel Numbers F2610-012-000-028, F2610-012-000-036, and F2610-012-000-037 (hereinafter referred to as the "Keller Farm").

3. The Defendants, Charles E. Keller and Christopher E. Keller, ("hereinafter referred to as "Kellers"), are residents of Butler County, Ohio, residing at 1242 Bauer Road, Somerville, Butler County, Ohio.

4. The Defendant, Michael Simmons, (hereinafter referred to as "Simmons"), is a resident of Butler County, Ohio, residing at 3047 Circling Road, Hamilton, Butler County, Ohio.

5. The Defendant, Ridgewind Quail Farms is an unincorporated Field Trial Club, as that term is used in Title XV Conservation of Natural Resources, Ohio Revised Code 1533 et seq., owned and operated by Defendant, Charles E. Keller, and Defendant, Michael Simmons. Ridgewind Quail Farms principle place of business is 1242 Bauer Road, Somerville, Butler County, Ohio.

6. The Defendant, National Shoot to Retrieve Association-Ohio Region, is an unincorporated association, operated by Regional President, David Bliss, whose principle place of business is 642 Sandusky Street, Ashland, Ohio 44805.

7. The Defendant, Butler County Zoning Board of Appeals, and its members, Defendants Lee Steenken, John Zboril, Alan Daniel, Thomas Bevington and Gary Salmon,

are empowered by the Butler County Commissioner to enforce the Butler County, Ohio Zoning Resolution.

8. The Defendant's, Courtney Combs, Michael Fox, and Charles Furmon, are the County Commissioners elected to govern Butler County, Ohio, and in that capacity appoint various officials to perform regulatory functions interpreting and enforcing administrative rules, resolutions and regulations. In their capacity as County Commissioners, the Defendants appointed and/or are responsible for the acts or omissions of the Butler County Zoning Board of Appeals.

9. Venue properly lies in the Court of Common Pleas, Butler County, State of Ohio, pursuant to Civ.R. 3. Jurisdiction properly lies with the Court of Common Pleas, Butler County, State of Ohio.

II. OPERATIVE FACTS

10. The Loriz property is comprised of approximately 45 acres, a portion of which shares a common property line with the Keller Farm. The Keller Farm is comprised of approximately 180 acres. Both properties are zoned A-1 (Agricultural District) as defined in the Butler County Zoning Resolutions as revised March 11, 2000.

11. The Loriz property is mostly wooded, and is being reforested under the State of Ohio's State Stewardship Incentive Plan.

12. The Keller Farm is primarily cultivated fields.

13. The Loriz family residence is located less than 200 feet from the property line with the Keller Farm.

14. On or about November, 2000, the Defendants, Charles Keller, Christopher Keller, and Michael Simmons, began to advertise hunting, under the name Ridgewind Quail Farm. Advertising was accomplished by the posting of signs in the area surrounding Defendants' property located at 65087 State Road, with the name Ridgewind Quail Farm, combined with a phone number with the number suffix as "HUNT".

15. On or about May 10, 2000, Charles E. Keller applied and received approval for a Dog Training Grounds Application and Permit, with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.191. (Copy of permit application attached as Plaintiff's Exhibit "A" and hereinafter referred to as "Training Permit".)

16. The Training Permit failed to provide a proper legal description of the property where the training was to be conducted.

17. On or about May 10, 2000, Charles E. Keller applied for a Commercial Wild Animal Propagation Permit Application and License with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.71. (Copy of permit application attached as Plaintiffs' Exhibit "B" and hereinafter referred to as "Propagation Permit".)

18. The Propagation Permit specified the Bobwhite Quail were to be held at the Keller Farm.

19. At a date, as yet unknown, but within the preceding 10 months, Charles E. Keller, applied for a Field Trial Club permit with the Ohio Department of Natural Resources, pursuant to Ohio Revised Code 1533.19

20. On or about January 20 or 21, 2001, the Loriz family were awakened by the sound of numerous shotguns being fired, men shouting, dogs barking, and All Terrain Vehicles running. This continued during the course of the entire day of January 20, 2001, and was repeated on January 21, 2001. The Loriz's subsequently discovered that the activity they heard and witnessed was a commercial Quail hunt, and dog field trials, organized and operated by Charles Keller, Christopher Keller and Michael Simmons, in their individual capacities, and through a field trail club known as Ridgewind Quail Farm. Additionally, the trial was advertised, sponsored and conducted by Defendant, National Shoot to Retrieve Association-Ohio Region. At the conclusion of the trials, awards were presented to the top three participants in various categories. Many of the aforementioned activities occurred within 200 feet of the Loriz family residence.

21. On or about March 24 and 25, 2001, a second field trial was conducted upon the Keller Farm again, awakening the Loriz family to the sound of numerous shotguns being fired, men shouting, dogs barking, and All Terrain Vehicles running. This continued during the course of the entire day of March 24, 2001, and was repeated on March 25, 2001. The Loriz's subsequently discovered that the activity they heard and witnessed was a commercial Quail Hunt, and dog field trials, organized and operated by Charles Keller, Christopher Keller, and Michael Simmons, in their individual capacities, and through a field trial club know as Ridgewind Quail Farm. Additionally, the trial was advertised, sponsored and conducted by Defendant, National Shoot to Retrieve Association-Ohio Region. At the conclusion of the trials, awards were presented to the top three participants in various categories. The aforementioned activities occurred within 200 feet of the Loriz family residence.

22. Other field trials and activities envisioned by the Field Trial permits, have occurred on the Keller Farm in the preceding six months.

23. The Kellers constructed, or caused to be constructed, two wooden towers, in excess of fifteen feet in height, upon the Keller Farm and are utilized for judging the field trials which were the subject of the aforementioned permits. Such towers are within several hundred feet from the Loriz family residence.

24. The January 20 and 21, 2001, activities that occurred on the Keller Farm, were field trials, as that term is defined in the O.R.C. 1533 et. seq. The Kellers, nor Ridgewind Quail Farms, nor National Shoot to Retrieve Association-Ohio Region, were in compliance with the signage requirements of O.R.C. 1533.22.

25. The January 20 and 21, 2001, activities that occurred on the Keller Farm, and the activities occurring on March 24 and 25, 2001, as well as the recently constructed two towers are all in violation of Articles 6 and 7 of the Butler County Zoning Resolutions as revised March 11, 2000.

26. On February 28, 2001, the Butler County Zoning Department issued a "Notice of Violation Under Butler County Zoning Resolution". (Copy attached as Plaintiff's Exhibit "C".) The aforementioned Notice of Violation specifically identified violations of Sections 6.01, 6.08, 7.01 and 7.03 of the Butler County Zoning Resolutions as revised March 11, 2000.

27. Participants of the January, 20 and 21, 2001, activities originating upon the Keller Farm, trespassed upon the Loriz property.

28. The activities that occurred on January 20 and 21, 2001, and March 24 and 25, 2001, upon the Keller Farm, as well as other items within the past six months caused the Loriz family to fear walking outside on their own property in an area that is in close proximity to the aforementioned activities for fear of being stricken by shotgun pellets emanating from the activities occurring upon the Keller Farm.

29. On July 26, 2001, the Defendants, Lee Steenken, John Zboril, Alan Daniel, Thomas Bevington, and Gary Salmon, in their capacity as members of the Butler County Zoning Board of Appeals granted a Conditional Use to the Defendants, Kellers, allowing for the property to be used as a commercial bird shooting preserve. This granting of a conditional use was arbitrary and capricious. As a result thereof, the Plaintiffs have been deprived of the quiet enjoyment of their land, have had their land subject to trespass, have been subjected to nuisance and have been precluded from utilizing their land and thus been subject to a taking of their land, all to their detriment.

30. Notwithstanding, the Defendants, Kellers and Simmons, have failed to abide by the conditions and requirements set forth in the Conditional Use all to the Plaintiffs detriment.

COUNT ONE

VIOLATION OF THE BUTLER ZONING RESOLUTIONS

31. Plaintiffs repeat Paragraphs 1 through 30 as if fully rewritten herein.

32. The Defendants, the Kellers and Ridgewind Quail Farm, are in violation of the Butler County Zoning Resolutions, and such violations result in the Loriz loss of Quiet Enjoyment, such violations constitute a wrongful taking of real property, as the Loriz may not use that portion of their property adjoining the Keller Farm, when field trial activities are taking place. [The Kellers use the Loriz wooded property to provide "cover" for Quail they raise and release for field trials unjustly enriches them at the Loriz expense.]

33. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT TWO

LOSS OF QUIET ENJOYMENT

34. Plaintiffs repeat Paragraphs 1 through 33 as if fully rewritten herein.

35. The field trial activities identified above, are permitted by the Defendants, the Kellers, Simmons, and Ridgewind Quail Farm, and result in the Loriz loss of Quiet Enjoyment. The activities preclude the Loriz from enjoying their property in a manner reasonably to be expected for property zoned A-1 Agricultural as set forth above.

36. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT THREE

TRESPASS TO LAND

37. Plaintiffs repeat Paragraphs 1 through 36 as if fully rewritten herein.

38. The Defendants, the Kellers, Simmons, Ridgewind Quail Farm, and the National Shoot to Retrieve Association-Ohio Region, failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, resulted in the Loriz property being trespassed upon.

39. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT FOUR

NUISANCE

40. Plaintiffs repeat Paragraphs 1 through 39 as if fully rewritten herein.

41. The actions of the Defendants, the Kellers, Simmons, Ridgewind Quail Farm, and the National Shoot to Retrieve Association-Ohio Region, constitute a nuisance, due to excessive noise, due to the Defendants negligent failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose' the Keller

Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, such that participants in the field trials are firing their weapons in close proximity to the Loriz family home, thereby creating a potential and unreasonable risk of harm.

42. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

COUNT FIVE

PRIVATE TAKING OF REAL PROPERTY

43. Plaintiffs repeat Paragraphs 1 through 42 as if fully rewritten herein.

44. The Defendants, the Kellers, Simmons, Ridgewind Quail Farm, and the National Shoot to Retrieve Association-Ohio Region, actions constitute a private taking of real property, due to the Defendants negligent failure to properly demark the Keller Farm property lines, their failure to have posted signage as dictated by Ohio Revised Code 1533.22, and their failure to "wholly enclose" the Keller Farm, as is required by Ohio Revised Code 1533.70 and 1533.71, and their failure to control users of the Keller Farm, such that participants in the field trials are firing their weapons in close proximity to the Loriz family home and adjacent property, creating a potential and unreasonable risk that someone on the Loriz property may be struck by shot from participants in the field trial. Such risk, thereby precludes a reasonable and prudent person from utilizing their personal property for their own use and enjoyment during the aforementioned field trials.

45. As a direct and proximate result of the Defendants actions, Plaintiffs have been damaged and have been deprived in an amount yet to be determined.

WHEREFORE, the Plaintiffs pray that this Court grant judgment in an amount in excess of Twenty-five Thousand Dollars ($25,000.00), representing the damages suffered by Plaintiffs as a result of Defendants violation of the Zoning Resolutions, loss of quiet enjoyment, trespass to land, nuisance, private taking of real property, and violations of Plaintiffs' Due Process Rights, plus court costs, punitive damages, attorney fees, and all other relief this Court deems fit.

Respectfully submitted,

/s/_____
GREGORY E. HATCHER
Co-Counsel for Plaintiffs
Ohio Sup. Ct. Reg. No. 0021559
301 High Street, Suite 400
Hamilton, Ohio 45011
Telephone: (513) 867-1856

/s/_____
DONALD C. LEROY
Co-Counsel for Plaintiffs
Ohio Sup. Ct. Reg. No.
304 N. Second Street
Hamilton, Ohio 45011
Telephone: (513) 867-8200

JURY DEMAND

The Plaintiffs herein requests this Court empanel a jury to hear the within cause of action.

/s/_____
GREGORY E. HATCHER
Attorney for Plaintiffs
Ohio Sup. Ct. Reg. No. 0021559
301 High Street, Suite 400
Hamilton, Ohio 45011
Telephone: (513) 867-1856

APPENDIX 7

COURT OF COMMON PLEAS
Butler County, Ohio

Case No. CV 2001-04-0714

[Filed April 11, 2003]

Michael Loriz, et al	)
Plaintiffs	)
	)
v.	)
	)
Charles E. Keller, et al	)
Defendants	)
	)

ENTRY

This matter came on for hearing on the appeal of the Plaintiffs/Appellants, Michael Loriz and Cara Loriz from the final decision of the Zoning Board of Appeals of Butler County, Ohio, issued on July 26, 2001, and the amended decision issued February 19, 2003, granting a variance to Defendants/Appellees Charles E. Keller regarding his property located at 6508 State Road, Somerville, Ohio, 45064, permitting a commercial bird shooting preserve.

Section 2506.04 of the Ohio Revised Code sets forth the standard of review that the Court must apply. The Court may

find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The Court may affirm, reverse, vacate or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions, or decision with the finding or opinion of the Court.

The Court must weigh the evidence in the record, and whatever additional evidence was permitted pursuant to statute to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision. This does not mean, however that the Court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. (Dudukovich v. Housing Authority, 58 OS 2nd 202

This Court, after careful consideration of the evidence finds that the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record.

It is therefore the order of this Court that the decision of the Butler County Board of Zoning Appeals is affirmed.

This Court further finds that this is no just cause for delay and this is a final appealable order.

This Court further finds that the previous stay order issued by this Court is hereby vacated.

Costs to Plaintiffs.

/s/_____
Judge William B. Stapleton

APPENDIX 8

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CASE NO. CA2003-04-100

[Filed December 8, 2003]

IN RE:	)
	)
APPLICATION OF	)
CHARLES E. KELLER.	)
	)

CIVIL APPEAL FROM BUTLER COUNTY
COURT OF COMMON PLEAS
Case No. CV01-04-0714

OPINION

VALEN, P.J.

{¶1} Appellants, Michael and Cara Loriz, appeal the decision of the Butler County Court of Common Pleas affirming the decision of appellee, Butler County Board of Zoning Appeals ("BZA"), granting appellee, Charles Keller ("Keller"), a conditional use permit to operate a commercial hunting range. We affirm the decision of the lower court.

{¶2} In July 1995, appellants purchased 45 acres of property in Butler County adjacent to Keller's property. Appellants built a 5,000 square foot home on the property.

{¶3} In September 1995, Keller approached appellants and informed them of his intention to open a commercial hunting range on his property with his business partner, Michael Simmons ("Simmons"). However, Keller's financial backers reconsidered and the commercial hunting range was not opened.

{¶4} In 2001 Keller erected a sign advertising his business, Ridgewind Quail Farm. Keller raises pheasants, quail, partridge and ducks and allows hunters to hunt the farm-raised birds. On February 28, 2001, Keller was cited for running a commercial hunting business on his property. The BZA affirmed the violation order. Keller then applied to the BZA for a conditional use permit to operate a commercial hunting range on his property. A hearing was held on July 17, 2001. The BZA granted the conditional use permit with several conditions.

{¶5} Appellants appealed the granting of the conditional use permit to the Butler County Common Pleas Court. The common pleas court remanded the matter to the BZA with orders to hear additional testimony and to submit written findings of fact to the common pleas court. The BZA heard additional evidence on February 4, 2003. Following the hearing, the BZA filed "Conclusions of Fact" with the common pleas court.

{¶6} On April 11, 2003, the common pleas court affirmed the BZA's decision to grant Keller a conditional permit for a commercial hunting range. Appellants appeal the common pleas court's decision raising two assignments of error:

{¶7} Assignment of Error No. 1:

{¶8} "THE JULY 17, 2003 [SIC] BZA HEARING WAS NOT CONDUCTED IN ACCORDANCE WITH OHIO LAW."

{¶9} Appellants argue that the July 17, 2001 hearing was not conducted as an adjudicatory hearing. Appellants maintain that "the hearing was conducted as a non-evidentiary, public political meeting, at which any member of the public could speak, regardless of whether he or she possessed information relevant to the BZA's decision." Therefore, appellants maintain that it was improper to "rely on subjective and unsubstantiated opinions, unsworn testimony, and testimony not subject to cross-examination."

{¶10} The transcript indicates that all witnesses except for two were sworn at the July 17, 2001 hearing. The two witnesses not sworn were attorneys. The Board stated that as officers of the court, "it's not necessary to swear you in." However, appellants never requested that witnesses be sworn in. The "omission of administration of the oath to a witness in a trial or administrative hearing is a waivable error." *Dudukovich v. Lorain Metro. Housing Auth.* (1979), 58 Ohio St.2d 202, 206. Where there is no objection to the admission of unsworn testimony at an administrative hearing, any error allowing such evidence is waived and the court must then consider the unsworn testimony as though it were given under oath. *Zurow v. Cleveland* (1978), 61 Ohio App. 2d 14, syllabus. Furthermore, if timely objection is not made "this error is waived throughout the entire proceeding, including the appellate level." Id. Since appellants did not object to the witnesses that were not sworn in, appellants have waived this issue.

{¶11} Appellants also argue that they were not permitted to cross-examine witnesses. However, they never asked to cross-examine witnesses during the proceedings before the BZA. Failure to request cross-examination of a witness acts as a waiver. *Kandell v. City Council of Kent* (Aug. 2, 1991), Portage App. No. 901-P-2255. Inasmuch as appellants did not "raise the issue of cross-examination during the proceedings before the [BZA], they waived their rights to claim these errors in an appeal to the Common Pleas Court *** and subsequently to this court." *Zurow* at 24.

{¶12} Appellants also argue that they were "limited in presenting evidence in ways Keller was not." As an example, appellants argue that their "testimony was limited to five minutes." However, a review of the record demonstrates that Michael Loriz stated at the hearing, "I'd like to, within five minutes if I can, try to give you a little background of the entire-six-year history of my involvement with the case and then go into the safety aspects which I think are very critical from my - from my standpoint." When Loriz concluded he was asked, "do you have any concluding remarks?" Loriz responded, "thank you very much for your time and consideration. And I would ask that you deny this request that's before you." Furthermore, after Simmons testified before the BZA, Loriz was allowed to offer a rebuttal of statements made by Simmons. We find that the appellants were not limited in presenting evidence.

{¶13} The common pleas court found, "after careful consideration of the evidence, [that] the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record." A court of appeals is required to affirm the decision of a common pleas court in an appeal of an administrative decision "unless the court of appeals finds, as a matter of law, that the

decision of the Common Pleas Court is not supported by a preponderance of reliable probative and substantial evidence." *Dudukovich*, 58 Ohio St.2d at 207.

{¶14} Having examined the record, this court finds that appellants have waived any errors regarding unsworn testimony and testimony not subjected to cross-examination.

Furthermore, appellants were not limited in presenting evidence. The decision of the common pleas court is supported by a preponderance of reliable probative and substantial evidence, and the common pleas court did not abuse its discretion in finding as it did. The first assignment of error is overruled.

{¶15} Assignment of Error No. 2:

{¶16} "THE COURT OF COMMON PLEAS ERRED IN UPHOLDING THE CONDITIONAL USE PERMIT TO OPERATE A COMMERCIAL HUNTING RANGE BECAUSE THE BZA'S DECISION WAS UNREASONABLE AND UNSUPPORTED BY THE PREPONDERANCE OF SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE."

{¶17} Appellants argue that "even if the Common Pleas Court were permitted to consider the unsworn and uncross-examined [sic] evidence submitted at the July 17, 2001 hearing, the court still erred in upholding the BZA's decision because Keller's evidence was overwhelmed by the evidence submitted by the Lorizes."

{¶18} A common pleas court should not substitute its judgment for that of an administrative board, such as the board of zoning appeals, unless the court finds that there is

not a preponderance of reliable, probative and substantial evidence to support the board's decision. *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34. Furthermore, the common pleas court "must give due deference to the administrative agency's resolution of evidentiary conflicts." *Budd Co. v. Mercer* (1984), 14 Ohio App.3d 269, 273-4. The common pleas court found, "after careful consideration of the evidence, [that] the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record."

{¶19} An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, rehearing denied (1993), 67 Ohio St.3d 1439. In *Pons*, the Ohio Supreme Court noted:

{¶20} "While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court. The appellate court is to determine only if the trial court has abused its discretion, i.e., being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. Absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its judgment for [that of an administrative agency] or a trial court. Instead, the appellate court must affirm the trial court's judgment." Id. See, also, *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.* (Sept. 24, 1992), Franklin App. No. 91AP-1493, motion to certify overruled, 66 Ohio St.3d 1459. After reviewing the common pleas court's decision, we find that the lower court did not abuse its discretion as there was evidence in the BZA findings supporting its decision.

{¶21} Appellants also argue that the transcripts of the hearing are inaccurate as words are "randomly misstated and omitted." Therefore, appellants argue that the decision should be vacated and remanded for a new hearing so that an accurate record of testimony can be made.

{¶22} Pursuant to R.C. 2506.03, which deals with the hearing of an appeal from an administrative decision, "[t]he hearing of such an appeal shall proceed as in trial of a civil action, but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that "[t]he transcript does not contain a report of all evidence admitted or proffered by the appellant."

{¶23} We have reviewed the transcripts and found that the gaps are not so extensive that the gist of the arguments and testimony cannot be ascertained. *Franklin Twp. v. Marble Cliff* (1982), 4 Ohio App.3d 213, 216. See, also, *BP Oil Co. v. Dayton Bd. of Zoning Appeals* (1996), 109 Ohio App. 3d 423, 436. Consequently, the second assignment of error is overruled.

{¶24} Judgment affirmed.

YOUNG and POWELL, JJ., concur.

APPENDIX 9

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

CASE NO. CV2001 04 0714

[Filed December 6, 2005]

MICHAEL LORIZ, et al.	)
Plaintiff,	)
	)
v.	)
	)
CHARLES E. KELLER,	)
et al.	)
Defendants.	)
	)

(Judge McCracken)

DECISION

This matter came before the court for oral hearings on various motions. The responses thereto filed by both the plaintiffs and the defendants.

The first motion before the court is defendant's "Motion to Award Damages to Defendant against Plaintiff." On April 11, 2003, this court upheld the decision of the Butler County Board of Zoning Appeals which granted the defendants the

right to operate a commercial hunting preserve known as Quail Ridge Hunt Club. This mater was before the court pursuant to an appeal of the BZA decision which was filed by plaintiffs, Michael and Cara Loriz, pursuant to R.C. Sec. 2506.01 et seq "Administrative Appeals." As part of this appeal, the plaintiffs requested a stay of the BZA decision. Now the defendants, having been successful, want damages. Their request for damages is couched in terms of Civ. R. 65(B) which refers to preliminary injunctions and the granting of damages. However, in this particular case this was not an injunction but a stay granted pursuant to Sec. 2635 of the Butler County Zoning Resolution. Although defendants requested an appeal bond, that request was not approved by the court and no bond was ever required to be posted.

The court finds that there is no provision for granting damages in regard to a "stay" where the applicant is unsuccessful. Even if there was, the amount of damages is limited to the amount of the bond. In this case, no bond was required. *Consulting Agency v. Kingsland*, 69 O App. 3d 753 (1990).

Defendants' Motion for Damages is therefore **denied**.

The second motion before the court was filed by the plaintiffs to Order Withdrawal of John B. Connaughton as counsel to defendants Keller and Simmons. Plaintiffs argue that they intend to call Connaughton as a witness to testify about his knowledge of the case and to testify about his presence at the hunting club during which time a video was made of some test shots and a decibel meter (to show noise levels). Mr. Connaughton was not the only person present.

The court has reviewed the Disciplinary Rules DR5-102(B) and finds that plaintiffs' motion is premature. DR5-

102(B) only requires an attorney to step down if it is apparent that his testimony is or may be prejudicial to his client. At this time, it is not clear whether this is the case. Plaintiffs also take exception to Connaughton's representation before the BZA. However, his comments before the BZA were in the form of argument and summation and cannot be considered as testimony on behalf of his client, no matter how forceful they might have been.

For these reasons, plaintiffs' motion to order the withdrawal of J.B. Connaughton as attorney for defendants is **denied** at this time.

The third motion before the court was filed on behalf of the Butler County Commissioners and the members of the Butler County Board of Zoning Appeals (BZA) to dismiss the amended complaint which added them as party defendants. In paragraphs 7 and 8 of the plaintiff's amended complaint, the commissioners are identified only as having the authority to appoint the members of the BZA and plaintiff claims that because of this they are responsible for their actions. The BZA is identified as having the power to enforce the zoning resolution. In paragraph 29, the BZA is accused of acting in an arbitrary and capricious manner in the granting of the conditional use permit to the defendants herein. No other allegations are made against the commissioners and the BZA in counts 1 through 5 of the amended complaint.

R.C.Section 303.04 requires the Board of County Commissioners to appoint a zoning commission and R.C. 303.13 also requires the Board to appoint a Board of Zoning Appeals.

R.C. 2744.02(A) classifies the functions of a political subdivision as either governmental or proprietor and except

for specified exceptions a political subdivision is not liable in a civil action for damages. In this particular case, neither the action of the commissioners nor the BZA fall into one of the exceptions to liability. R.C. 2744.02(C) defines governmental function as any function that is performed by a political subdivision voluntarily or pursuant to legislative requirement. The Court finds that the Butler County Commissioners in appointing the members of the BZA were performing their governmental function in that they were required by law to appoint the members of the BZA.

With regard to the BZA, the Court also finds that they were fulfilling a governmental function in that they were performing a quasi-judicial function. See R.C. 2744.01(C)(2)(f). The Court finds after a review of the record that the BZA hearing resembled a judicial proceeding in that notice of the BZA proceedings were sent to both the plaintiff and defendant, who were both represented by counsel. At the hearing, the BZA also afforded both sides the opportunity to present their positions with evidence regarding whether to grant or deny the conditional use permit, and finally, a record was made. This decision was eventually appealed pursuant to R.C. 2506.01. (See Ikovich v. Steubonville, 144 Ohio App 325; Talbut v. Perrysburg, 72 O. Ap 3d 475.

The Court finds after a review of the pleadings and the record, that both the Butler County Commissioners and the BZA were fulfilling their governmental functions and are not liable in a civil action for damages.

The motion of the defendants Butler County Commissioners and the Butler County BZA is granted and they are hereby dismissed as party defendants in the above-captioned case.

The fourth motion to be considered by the Court is the Motion for Relief form Judgment filed pursuant to Civ. R. 60(B) by the plaintiffs. The plaintiffs allege that several exhibits submitted into the Court record as part of the original administrative appeal from the BZA are missing and have either been misplaced, lost, or were never provided to the Court in the first place. For these reasons, the plaintiffs assert that they should be granted relief from judgment on the grounds of mistake, inadvertence, excusable neglect or any other reason justifying relief.

The judgment from which plaintiffs seek relief was rendered by Judge William Stapleton on April 11, 2003. (Judge Stapleton is now deceased). The plaintiffs' contention is that because the record is not clear whether Judge Stapleton was provided these exhibits or had access to them, that his judgment is faulty and should be re-heard. During this time period, the plaintiff-appellants were represented by counsel who filed extensive trial memorandum, both before Judge Stapleton and also before the Court of Appeals in which he recited the facts and made reference to these documents. If in fact these documents were missing, and there is no way to determine this, Judge Stapleton was made aware of them, and if necessary could have requested that counsel supply them.

The Court finds that the plaintiffs have failed to establish any of the five prongs of Civ. R. 60(B) and for this reason, the Motion to Reconsider is hereby **denied**.

Enter this 4 day of December, 2005.

So Ordered,

/s/_____
William B. McCracken, Judge

APPENDIX 10

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

Case No. CV05-07-2228

[Filed July 6, 2005]

MICHAEL LORIZ, et al.	)
Appellant	)
	)
v.	)
	)
Butler County Board of	)
Zoning Appeals	)
	)

NOTICE OF APPEAL OF DECISION OF THE ZONING BOARD OF APPEALS OF BUTLER COUNTY, OHIO

The undersigned, Michael Loriz and Cara Loriz, representing themselves as pro se appellants, hereby give notice of their appeal to the Common Pleas Court of Butler County, Ohio, from the final order, adjudication or decision of the Zoning Board of Appeals of Butler County, Ohio, rendered on the 9th day of June, 2005, in which it was decided by Resolution and held that Charles E. Keller may operate his commercial recreational facility at his property located at 6508 State Road, Somerville, Ohio, 45064, 365

days a year, from sunrise to sunset, and without any further annual review by the Board. A copy of the Resolution is attached hereto and marked Exhibit "A."

Appellants also ask that a Stay of Proceedings be enforced by the Board of Zoning Appeals, staying the expanded operation of the subject commercial recreational facility. If the Board refuses to do so, appellants ask that such a Stay be ordered by the Court in accordance with Section 26.35 of the Butler County, Ohio Zoning Resolution which states:

> An appeal shall stay all proceedings in furtherance of the action appealed from, unless the Zoning Inspector certifies to the Board, after notice of appeals shall have been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by an order which may, on due cause be granted by the board on application after notice to the Zoning Inspector, or by judicial order.

Respectfully submitted,

/s/_____
MICHAEL H. LORIZ
Pro Se Counsel/Plaintiff
PO Box 923; 11 Marc Street
Shelter Island, NY 11964-0923

/s/_____
CARA F. LORIZ
Pro Se Counsel/Plaintiff
PO Box 923; 11 Marc Street
Shelter Island, NY 11964-0923

APPENDIX 11

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 06-3427

[Filed July 13, 2006]

MICHAEL HANNING LORIZ;	)
CARA FRANCKE LORIZ	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
JOHN B. CONNAUGHTON, et al	)
Defendants-Appellees.	)
	)

MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL

The Plaintiffs-Appellants move this Court for an injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8. In accordance with that Rule, Plaintiffs-Appellants filed an initial motion in the District Court on April 6, 2006. The District Court has not acted. With no assurance from the District Court clerk that the motion will be adjudicated before the end of the appeal period, action by the District Court appears to be impracticable.

Plaintiffs-Appellants ask this Honorable Court to enjoin the irreparable harm created by an unconstitutional taking acknowledged by the District Court in its appealed decision. Beginning September 1, 2006 (absent injunction), another season of shooting operations will be commenced by the Defendants-Appellees, and lead shot trespass onto our property (and onto the local watershed) will continue. Opposition counsel was previously noticed of the instant motion by way of the District Court filing of April 6, 2006, as well as in our Second Reply in Support of Motion to Reconsider, mailed June 29, 2006. That motion challenges an extension of time granted to the Defendant-Appellees by the clerk, a delay in briefing that heightens the need for the injunction.

Respectfully submitted,
/s/_____
/s/_____
MICHAEL H. LORIZ
CARA F. LORIZ
Pro Se Plaintiffs-Appellants
11 Marc Street
P.O. Box 923
Shelter Island, NY 11964

MEMORANDUM IN SUPPORT

Plaintiffs-Appellants (hereinafter, the Loriz family) ask the Court to enjoin shooting operations by Defendants Keller, Keller, Simmons and Ridge Wind Quail Hunts LLC (hereinafter, the Shooters) that result in lead shot trespass as illegally and unconstitutionally authorized by Defendant Stephen Gray (the State) and the County (Defendants Steenken, Bevington, Salman, Zboril, Filpot, Daniel[1], Turner, Gates, Balsinger, J. Fox, M. Fox, Jolivette, Furmon, Dwyer, Jones and Piper).

The District Court ruling under appeal found that shooting operations authorized by the State and County substantiate a taking of the Loriz family property (R.75). We urgently request this Court to enjoin the permitting, licensing, and operation of shooting range, dog training and field trial activities on the property of Charles and Christopher Keller during the pendency of the appeal of our case in the Sixth Circuit. We specifically ask for an injunction against the County conditional use permit (BZA Resolution No. 01-26C) and all State Division of Wildlife permits and licenses for shooting activities of any kind on the Keller property.

---

[1] These first six defendants are Butler County Board of Zoning Appeals members and when referred to as a group separately from the other County Defendants are named "the BZA."

APPENDIX 12

RELEVANT STATUTORY PROVISIONS INVOLVED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 81. SUPREME COURT

28 U.S.C. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

TITLE 25. COURTS -- APPELLATE
CHAPTER 2506. APPEALS FROM ORDERS OF ADMINISTRATIVE OFFICERS AND AGENCIES

O.R.C. § 2506.04

§ 2506.04. Finding and order of court

If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

TITLE 1. STATE GOVERNMENT
CHAPTER 163. APPROPRIATION OF PROPERTY

O.R.C. § 163.05

§ 163.05. Petition for appropriation

An agency which has met the requirements of section 163.04 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership,

or interest or right therein. The petition of a private agency shall be verified as in a civil action and all petitions shall contain:

(A) A description of each parcel of land or interest or right therein sought to be appropriated, such as will permit ready identification of the land involved;

(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;

(C) A statement of the purpose of the appropriation;

(D) A statement of the estate or interest sought to be appropriated;

(E) The names and addresses of the owners, so far as they can be ascertained;

(F) A statement showing requirements of section 163.04 of the Revised Code have been met;

(G) A prayer for the appropriation;

(H) In the event of an appropriation where the agency would require less than the whole of any parcel containing a residence structure and the required portion would remove a garage and sufficient land that a replacement garage could not be lawfully or practically attached, the appropriation shall be for the whole parcel and all structures.

In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any parcel of

property, the agency shall either make available to the owner or shall file in the office of the county engineer, a description of the nature of the improvement or use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans shall be acceptable in providing such description for the purposes of the preceding sentence in the appropriation of land for highway purposes.

O.R.C. § 163.09

§ 163.09. Valuation of property taken; how determined

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, and no approval ordered by the court to a settlement of the rights of all necessary parties, the court, on motion of a public agency, shall declare the value of the property taken and the damages, if any, to the residue to be as set forth in any document properly filed with the clerk of the court of common pleas by the public agency. In all other cases, the court shall fix a time, within twenty days from the last date that the answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in that section, the court shall set a day, not less than five or more than fifteen days from the date the answer was filed, to hear those matters. Upon those matters, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or

board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of that necessity in the absence of proof showing an abuse of discretion by the agency in determining that necessity. If, as to any or all of the property or other interests sought to be appropriated, the court determines the matters in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of that determination. An order of the court in favor of the agency on any of the matters or on qualification under section 163.06 of the Revised Code shall not be a final order for purposes of appeal. An order of the court against the agency on any of the matters or on the question of qualification under section 163.06 of the Revised Code shall be a final order for purposes of appeal. If a public agency has taken possession prior to such an order and such an order, after any appeal, is against the agency on any of the matters, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (A)(2) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court, with the consent of the parties, may order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

(F) If an answer is filed under section 163.08 of the Revised Code with respect to the value of property appropriated under section 307.08, 504.19, 6101.181 [6101.18.1], 6115.221 [6115.22.1], 6117.39, or 6119.11 of the Revised Code as the result of a public exigency, the burden of proof with respect to that value is on the party or parties to the appropriation other than the property owners.

O.R.C. § 163.17

§ 163.17. Interest payable on verdict

Where the agency has the right to take possession of the property before the verdict upon payment into court of a deposit, and a portion of said deposit may be withdrawn immediately by the owner, the amount of the verdict which exceeds the portion of the deposit withdrawable shall be subject to interest from the date of taking to the date of actual payment of the award.

Where the agency has no right to take possession of the property before the verdict, if the award is not paid to the owner or deposited in court within twenty-one days after journalization of the verdict, interest thereafter shall accrue, except that where the owner appeals, interest shall not accrue until the agency takes possession.

If the owner appeals and is granted a larger award, interest shall be paid on the additional amount awarded from the date

of taking possession to the date of actual payment or date of deposit with immediate right of withdrawal.

If the agency wishes to appeal, it may require the deposit to remain with the court pending final disposition of the case provided it pays interest on the final award from date of taking possession to the date the money is actually paid or made available to the owner; provided, the owner may withdraw the entire award upon posting an appropriate refund bond set by the court; and provided, that where a building or other structure is taken, the court may, on application of the owner, permit the owner to withdraw a reasonable portion of the award allocable to the building without giving bond.

If the amount of any deposit actually withdrawn by the owner exceeds the final award from which no appeal is or can be taken, then the owner at the time of entry of judgment on such award shall refund at once to the court for the account of the agency the amount of such excess plus interest on such excess from the date of withdrawal of such excess until the date of such refund, and upon the failure of the owner to make such refund, the agency shall be entitled to a money judgment against the owner.

Except for cases involving the department of transportation, interest as provided for in this section shall be at the rate of interest for judgments as set forth in section 1343.03 of the Revised Code. In a case involving the appropriation of property by the department of transportation, and the department is the sole public agency seeking to appropriate property in the case, interest as provided for in this section shall be at the per annum rate of either the interest rate as defined and established in division (E) of section 5703.47 of the Revised Code, or ten per cent, whichever is less.

TITLE 1. STATE GOVERNMENT
CHAPTER 163. APPROPRIATION OF PROPERTY DISPLACED PERSONS

O.R.C. § 163.54

§ 163.54. Additional payments for dwelling owned and occupied a minimum of 180 days

(A) In addition to payments otherwise authorized by sections 163.51 to 163.62 of the Revised Code, the head of the displacing agency shall make an additional payment not to exceed twenty-two thousand five hundred dollars to any displaced person who is displaced from a dwelling actually owned and occupied by him for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of the property. Such additional payment shall include the following elements:

(1) The amount, if any, which when added to the acquisition cost of the dwelling acquired by the displacing agency, equals the reasonable cost of a comparable replacement dwelling.

(2) The amount, if any, which will compensate the displaced person for any increased interest costs and other debt service costs which the person is required to pay for financing the acquisition of a comparable replacement dwelling. This amount shall be paid only if the dwelling acquired by the displacing agency was encumbered by a bona fide mortgage which was a valid lien on the dwelling for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of the dwelling.

(3) Reasonable expenses incurred by the displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(B) The additional payment authorized by this section shall be made only to a displaced person who purchases and occupies a replacement dwelling which is decent, safe, and sanitary not later than the end of the one-year period beginning on the date on which he receives from the displacing agency final payment of all costs of the acquired dwelling, or on the date on which the displacing agency's obligation under division (B)(3) of section 163.56 of the Revised Code is met, whichever is later, except that the displacing agency may extend the period for good cause. If the period is extended, the payment under this section shall be based on the costs of relocating the person to a comparable replacement dwelling within one year after the displaced person receives from the displacing agency final payment of all costs of the acquired dwelling.

O.R.C. § 163.55

§ 163.55. Additional payments for dwelling occupied a minimum of 90 days

(A) In addition to amounts otherwise authorized by sections 163.51 to 163.62 of the Revised Code, the head of a displacing agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 163.54 of the Revised Code which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling, or in any case in which displacement is not a direct result of

acquisition, not less than ninety days prior to such other event as the head of the lead agency shall prescribe. The payment shall consist of the amount necessary to enable the displaced person to lease or rent for a period not to exceed forty-two months, a comparable replacement dwelling, but not to exceed five thousand two hundred fifty dollars. At the discretion of the head of the displacing agency, a payment under this division may be made in periodic installments. Computation of a payment under this division to a low-income displaced person shall take into account the person's income.

(B) Any person eligible for a payment under division (A) of this section may elect to apply the payment to a down payment on, and other incidental expenses pursuant to, the purchase of a decent, safe, and sanitary replacement dwelling. The person may, under criteria established by the head of the displacing agency, be eligible under this division for the maximum payment allowed under division (A) of this section, except that, in the case of a displaced homeowner who has owned and occupied the displacement dwelling for at least ninety days but not more than one hundred eighty days immediately prior to the initiation of negotiations for the acquisition of such dwelling, the payment shall not exceed the payment the person would otherwise have received under section 163.54 of the Revised Code had the person owned and occupied the displacement dwelling one hundred eighty days immediately prior to the initiation of the negotiations.

O.R.C. § 163.61

§ 163.61. Reimbursement to owner for incidental expenses

The head of a state agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a

condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency considers fair and reasonable, for expenses he necessarily incurred for:

(A) Transfer taxes, and similar expenses incidental to conveying such real property to the state agency;

(B) Penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property;

(C) The pro rata portion of any real property taxes paid which are allocable to a period subsequent to the date of vesting title in the state or state agency, or the effective date of possession of such real property by the agency, whichever is the earlier.

(2)

No. 06-711

In The

Supreme Court of the United States

MICHAEL HANNING LORIZ
and CARA FRANCKE LORIZ,

Petitioners,

v.

JOHN B. CONNAUGHTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The availability of equitable relief to victims of constitutional violations associated with an improper taking of property is a question of national import that this Court has recognized but has yet to resolve.[1] The challenged order of the Sixth Circuit Court of Appeals exemplifies the need for review: if allowed to stand, it would establish a circuit court precedent that lawful owners of real property do not have the fundamental right to safely use their property without threat of harm from dangerous and illegal State-authorized activities trespassing from adjacent property so long as an economic remedy is at hand.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari fails to address the constitutional questions raised in the Petition. It relies instead on misrepresentation of facts and lower court rulings which are not in question here. The lack of substantive constitutional argument demonstrates both the untenable character of the challenged ruling and the indefensible nature of the shooting these Respondents authorize.

REASONS FOR GRANTING THE WRIT

The Respondents' brief is a regurgitation of defense assertions in the case pending before the Sixth Circuit. It offers little insight into the debate on whether equitable relief should be barred for all takings claims. The Court may find value in it, however, as justification for the exercise of its supervisory powers.

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[1] *Brown v. Legal Foundation of Wash.*, 538 U.S. 216 (2003).

I. THE RESPONDENTS OFFER NO SUBSTANTIVE OPPOSITION TO THE WRIT

Rather than addressing the petition questions, the Respondents assert that this Court cannot hear this case. Such an assertion belies simple facts on the record below. The Sixth Circuit Court of Appeals acknowledged not only jurisdiction to rule on a preliminary injunction motion but also the Petitioners' likelihood of success on the merits of their appeal. The Respondents' unwillingness to accept these facts does not justify this Court's review of arguments that have yet to be decided by the Sixth Circuit, and that are not germane to the issue at hand. Importantly, these arguments misrepresent the district court ruling and are inherently contradictory.

A. This Court Has Jurisdiction: *Rooker-Feldman* Cannot Apply to Claims Dismissed as "Unripe"

The primary argument presented by the respondents is a lack of jurisdiction. Unfortunately, this argument is undermined by a lack of understanding of the underlying doctrines and by repeated misrepresentation of rulings below.

The district court dismissed only judicial defendants pursuant to *Rooker-Feldman*. In dismissing the Respondents, the district court held:

> . . . it is manifest that Plaintiffs' Fifth Amendment takings claims, and the ancillary procedural and substantive due process claims . . . must fail for the same reasons that they cannot succeed against [other] defendants . . . *i.e.,* Plaintiffs' takings claims are not ripe for adjudication, *see Williamson County* . . . Petition App. 22a-23a.

The takings and "ancillary" claims were dismissed by the court "without prejudice." Such claims cannot be simultaneously unripe and barred by *Rooker-Feldman*.

The state court has never ruled on the legality or constitutionality of the county permit and has never ruled on the state license at all. Therefore, federal jurisdiction lies. See *Exxon Mobil v. Saudi Basic Industry Corp.*, 544 U.S. 280 (2005); *Coles v. Granville*, 448 F.3d 853 (6th Cir. 2006) and *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386 (6th Cir. 2002).

The Respondents state that the "lower courts' decisions," including the Sixth Circuit injunction denial, "were supported by several federal court doctrines which operate to bar the petitioners' requests for relief. Most notably, this Court's *Rooker-Feldman* doctrine . . . " Respondents' brief, p. 5, ¶2. This is one of many misrepresentations in the brief. The Sixth Circuit injunction order held that Loriz has a likelihood of success on appeal and never cited *Rooker-Feldman*.

B. The Lower Courts Did Not Abstain

The second argument presented by the respondents is as follows: "The Lower Courts Correctly Abstained From Reviewing the Matter." Respondents' brief, p. 13.

This statement is patently false. Neither the district court nor the Sixth Circuit invoked abstention doctrine in any ruling and did, in fact, rule. The district court was asked to abstain pursuant to the *Burford* doctrine[2] but did not do so. By failing to object to the lack of abstention in

[2] Ridge Wind motions, Case No. 1:05cv306, R.70, p. 3, R.86, p. 8.

the magistrate's Report and Recommendations, the defendants waived later abstention arguments. *Thomas v. Arn,* 474 U.S. 140, 155 (1985).

Furthermore, the defendants have not demonstrated the prerequisites of the abstention doctrines they cite. The state civil suit, which includes only private actors[3] as defendants, is in no way parallel to this §1983 suit against some 20 state actors, and cannot qualify for *Colorado* abstention.[4,5] The *Pullman* abstention cannot apply – defendants have never pointed to a state law that could be clarified in order to obviate the necessity of federal litigation. Finally, enjoining one private shooting range will not disrupt a complex regulatory scheme; the challenged county permit and state license are hardly on par with the Texas oil industry in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Furthermore, the repeated re-authorization of the shooting activities by state actors with full knowledge of the inherent lead shot threat raises these claims beyond state court nuisance and trespass issues.

The Respondents' arguments seem contradictory. When abstentions apply, the federal court inherently HAS

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[3] Those private actors have recently stipulated to the dismissal of the entire state civil suit. All arguments related to a state civil suit will soon be moot.

[4] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1975).

[5] The Respondents argue that the Butler County Common Pleas Court should hear all claims (p. 6, ¶2). They fail to note that all judges sitting on that court have recused themselves from Loriz cases. Petitioners strongly suggest that the state court cannot adequately protect their federal rights, a *Colorado* abstention criterion the Respondents ignored. *Romine v. CompuServe Corp.*, 160 F.3d 337, 340 (6th Cir. 1998).

jurisdiction of claims, concurrent with the state, but should abstain from using it.

C. The Respondents' Raise an Unsupported "Finality" Argument for the First Time

The Respondents assert for the first time that Loriz has failed to obtain the final administrative decision required for federal takings claims pursuant to *Williamson County*. Respondents' brief, p. 27, ¶1; p. 29, ¶2.

The district court made no such finding. Because Loriz did not pursue and complete "state court action seeking just compensation for the alleged inverse condemnation of their property, their instant action for claims of an unconstitutional takings is not yet ripe for adjudication." Pet. App. 12a, ¶3. The ruling does not question finality.

The district court did, however, enumerate the administrative appeal proceedings leading to the final decision of the Twelfth Appellate court to uphold Mr. Keller's permit. Pet. App. 8a, ¶2. Loriz suggests this new argument is also waived below, as abstention arguments were, pursuant to *Thomas v. Arn*, *supra*.

Because the challenged permit was adjudicated in state court to finality, the Respondents' argument implies that Loriz is required to pursue some additional form of administrative relief. But relief from what? There is no further administrative process to gain relief from the conditional use permit the BZA granted to Mr. Keller.

Loriz does not suffer from a burdensome section of zoning law applied to their own property for which further relief can be sought. Quite to the contrary, these Respondents granted a permit to a neighbor that simply does not exist in the zoning law.

Importantly, Loriz did seek a different form of relief from the BZA. As pleaded, they made multiple variance requests to the BZA to split their property beyond the shotfall zone. Pet. App. 34a, ¶24. The BZA denied these requests and *res judicata* bars additional efforts.

Further relief from the BZA could only invite further degradations of Loriz rights. The last time Petitioners traveled to Ohio for a zoning hearing, Mr. Loriz was physically removed from the hearing, without provocation, prior to being able to speak.

Inherent in the Sixth Circuit's order are important legal findings: that Loriz property is physically invaded by ballistics and that Loriz is likely to succeed on a private-use takings claim. Physically invaded property has inherently reached "finality" and private use takings are exempt from *Williamson County* tests. The Respondents' arguments are misplaced.

II. THE RESPONDENTS' BRIEF SUPPORTS THE NEED FOR INJUNCTIVE RELIEF

While the Respondents' legal arguments are better left to the Sixth Circuit, the Respondents' inability to honestly represent the activities they authorize implicates those activities and supports the need for injunction.

A. The Respondents Misrepresent the Challenged Activity and Acknowledged Takings

The Respondents avoid mentioning key facts in their brief. They characterize the permit they granted to Ridge Wind as one "to operate field trials for its patrons, sportsmen wishing to train and exhibit their hunting dogs' abilities." Respondents' brief, p. 3, ¶2. They mention neither shotguns nor shooting until page 29 of their 30-page brief: "In the instant case, the petitioners have been subject

to acts of private individuals, perhaps careless, shooting into their property during field trial events."

In fact, these Respondents approved shooting activities knowing they would result in shots entering the Loriz property. Testimony by various defendants, including Respondent William Balsinger, to the Board of Zoning Appeals demonstrates this fact. Reply App. 1.

These Respondents also practically and prospectively barred prosecution of any of the "careless" patrons who shoot into our property, no matter the evidence in hand. Petition App. 40a-41a. This impunity has been asserted despite the Respondents' contention that the "patrons could be . . . subject to prosecution for any criminal violations." Respondents' brief, p. 29.

The assertion that the Petitioners "have statutory remedy under Chapter 163 of the Ohio Revised Code" (p. 18) concedes that the Loriz property has been taken. It errs, however, in assuming that the taking was a proper one. Ohio law does not authorize physical takings by any of the Respondents nor by illegal activities. Importantly, Ohio law bars the taking of agricultural property (Petition, p. 27-28), a legal reality the Respondents do not refute.

The Respondents also do not refute that this taking is for a private use; ORC 163 cannot apply.

Respondents' assertions that the Petitioners are not victims of a *per se* physical taking are contradicted by their own statements, particularly the acknowledgement of "careless" patrons shooting into the Loriz property. The argument is also belied by the district court finding that the county conditions placed on the permit "were wholly insufficient to protect Plaintiffs and their property." Pet. App. 8a, ¶1.

The need for bodily protection obliterates any assertion that this is a purely regulatory taking. The activities

authorized by these Respondents do not merely reduce the value of property. They forced a family to flee their home as acknowledged by the Sixth Circuit order.[6]

Respondents assert that Loriz has not properly sought injunctive or declaratory relief for the taking (brief, p. 21-22). As pleaded, injunctive, declaratory and economic relief were clearly sought from the outset of this suit. Pet. App. 45a.

B. Loriz Property Use Is Criminalized

The Respondents aver that injunctions are only available for pre-deprivation facial challenges, or for taking victims whose property use has been criminalized. Respondents' brief, p. 7, 22-25. This argument is more to the point of the petition questions raised. However, implying that criminalization is a "per se rule(s) to qualify for injunction" appears to be unprecedented. *Ibid*, p. 7, ¶2. If it truly is an injunction rule, the Respondents are mistaken; Loriz property use has been criminalized.

Although Butler County officials have barred prosecution of any shooters on the range, they have tried to prosecute Petitioner Mike Loriz for acts associated with the legal use of his property, charging him repeatedly and in violation of constitutional guarantees. See Pet. App. 39a-40a. Rather than opposing injunction, the Respondents' criminalization argument supports it.

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[6] Respondents compare this taking by shotgun fire to other adjacent commercial uses such as a golf course, motocross course or a landfill (footnote, p. 21). Of course, such uses are distinguishable; they do not violate Ohio firearms statutes intended to protect public safety.

C. Factual Errors and Deficiencies

Factual errors, in addition to those already cited, further indicate that the challenged acts cannot be honestly defended and warrant injunction. The Respondents assert that State of Ohio licenses[7] were "approved by the Ohio State courts and are still being litigated in the Butler County Court of Common Pleas." Respondents' brief, p. 15-16. This same statement was shown to be false in the Loriz reply brief to the Sixth Circuit and yet Respondents raise it to the U.S. Supreme Court.

Ohio law provides no administrative process by which to appeal Division of Wildlife licenses and permits. These approvals have not been and cannot be adjudicated in state court. This false statement is material to a brief invoking jurisdictional and abstention doctrine.

The Respondents state that Loriz has not "alleged that Butler County Zoning ordinances were defective or otherwise not in full force and effect." Respondents' brief, p. 17, ¶2. This is also false. Loriz has repeatedly alleged that the permit, identified as "a commercial recreational use permit" (brief, p. 3, ¶2) is not allowed by the Butler County Rural Zoning Resolution. This is not a matter of interpretation; no such legal instrument exists. Pet. App. 31a.

The Respondents have also misrepresented the Loriz motion for injunction pending appeal, the only entry in their appendix pertinent to federal litigation. Respondents' App. 53a. They include only the first page of the 19-page memorandum with no mention of the omitted pages or the 10 exhibits attached.

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[7] State licenses are required for shooting events and operations separately from the county zoning permit.

The Respondents attempt to argue that other defendants, the Kellers who did not oppose this Petition, would be irreparably harmed by an injunction. Neither the Kellers nor the Respondents demonstrated harm in their responses to the motion for injunction pending appeal. The Sixth Circuit took note of their responses, calling them "distinctly deficient" and stating that "such deficiencies are not what the court expects from counsel appearing before the Sixth Circuit." Pet. App. 3a. Raising such claims here, with no substantiation below, is likewise deficient.

Finally, Loriz asks the Court to note that these Respondents were the only parties to oppose the Petition. They were also the only defendants who never brought a dispositive motion to the district court. Claims against them were improperly dismissed *sua sponte* without so much as naming the individual claims, some of which are unique to these defendants. Their assertions now may be too little, too late.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Testimony on shots entering the Petitioners' property presented to the Butler County Board of Zoning Appeals

Judge John B. Connaughton, shooting range attorney:

> I'm not going to say that shot isn't going to rain, and I use that literally . . . (2-04-03)
>
> Obviously, nobody wants to be hit in the face no matter what distance, you know, if you have a pellet hit you in the eye it could and probably would cause damage. (7-17-01)
>
> . . . because of the dense foliage, because of the [Loriz] forest, there is no safety problem. (4-17-01)

Charles Keller, Ridge Wind shooting range operator:

> . . . if you want to get into the Revised Code, it actually tells you that you're not allowed to shoot in[to] . . . anybody's property. That means it's impossible to shoot . . . unless you're shooting straight up in the air or straight down at the ground. . . . (5-17-05)

William Balsinger, County officer

> I'd be willing to stand over at the Loriz's property and let you stand there at that fence and let you shoot the shotgun at me, not in my face, in my back and I guarantee you you're not going to hurt me . . . That's how much I think this is a bunch of hooey. (5-17-05)

Excerpted from Appellants' Brief to the Sixth Circuit Court of Appeals, Case No. 06-3427, p. 9.